APRIL 28, 1956

THE

SOLICITORS' JOURNAL

VOLUME 100

NUMBER 17

CURRENT TOPICS

Shared Living Accommodation

AT last the House of Lords has been given an opportunity of declaring the law on one of the most serious social problems of the last ten years, that of shared living accommodation and the narrow line which divides it from separately let accommodation protected by the Rent Acts. In *Goodrich* v. *Paisner* (*The Times*, 20th April) His Honour Judge CLARK had made an order for possession of rooms where the use of a bedroom was shared with the landlord. The Court of Appeal (DENNING, ROMER and PARKER, L.JJ.) unanimously dismissed an appeal, and now the House of Lords, with one dissentient, LORD MORTON OF HENRYTON, has reversed the Court of Appeal. The reason for the decision, according to VISCOUNT SIMONDS, was the unusual nature of the tenancy agreement, and no doubt was cast on the law as laid down in *Neale* v. *Del Soto* [1945] 1 K.B. 144 or *Cole* v. *Harris* [1945] 1 K.B. 474. Sharing, he said, involved "the right of simultaneous use of a living-room in such a manner that the privacy of a landlord or tenant might be invaded." It was presupposed that under some further arrangement there would be not simultaneous user of the bedroom, but separate user at successive times. The decision turns, of course, on the facts before the court, and the decisions of 1945 were unanimously upheld. Possibly cases exist where it is contemplated that a bedroom should be a dormitory for two or more of the children of both the landlord's and the tenant's family, but this was not such a case. As LORD RADCLIFFE said: "The degree of sharing might vary from case to case, and the degree of variation might be relevant in considering whether there was a separate dwelling."

Resilient Purchaser

IT is curious, as LORD GODDARD remarked in *Peter Long and Partners* v. *Burns* [1956] 1 W.L.R. 413 (*ante*, p. 302), how many difficult points arise in cases relating to house agents' commission. Mr. DAVID NAPLEY, the second of whose articles reviewing the law on this subject appears in this issue, has suggested that some difficulties might be avoided if the terms of the contracts entered into between house agents and prospective vendors were expressed in writing. That this would not put an end to litigation is clear from the case which we have just quoted, and which turned on the interpretation of the words "binding contract." Lord Goddard held that, on the true construction of the particular contract between the agents and the vendor, the agents' commission was payable when the contract to purchase the property had been shown

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to be a binding contract (i.e., by the completion of the purchase), and not necessarily at the moment when the contract was signed, since the purchaser was on the facts entitled to resile from the contract. Lord Goddard also remarked in the course of his judgment that agents, not unnaturally, try to frame the commission notes for their clients to sign in such a way as to avoid the decisions which are given by the courts from time to time. If this is so, and whether or not it is natural, such a policy is not in the best interests of either the public or the agents, who in the nature of things must be prepared for disappointments and frustrations.

Jurisdiction in Lunacy

IN para. 101 of its second interim report, published on 16th March, 1951, the Committee on Supreme Court Practice and Procedure recommended that the jurisdiction in lunacy should be transferred from the Master of the Rolls and the Lords Justices of Appeal to the judges of the Chancery Division. This has now been done, states a notice from the Lord Chancellor's Office, by warrant under the Sign Manual, dated 10th April, 1956.

Settlement of Claims on Termination of Agricultural Tenancy

A POSTAL application to the Minister of Agriculture, Fisheries and Food under s. 70 (3) of the Agricultural Holdings Act, 1948, requesting an extension of time in which to settle claims between landlord and tenant arising on or out of the termination of a tenancy will not be made in time, the Ministry has been advised, unless it is *delivered* to the Ministry before the expiry of the periods mentioned in that subsection. Such applications should, therefore, be posted in ample time, a Ministry notice states, otherwise they may not be delivered until the appropriate period has expired, and could not then be granted. Applications concerning holdings in England should be addressed to the Ministry's office in Great Westminster House, Horseferry Road, London, S.W.1; those concerning holdings in Wales should be addressed to the Ministry's office at Caerleon, 8 Victoria Terrace, Aberystwyth, Cardiganshire.

Tenancy of a Council House and "Pecuniary Interest"

BY a unanimous decision in *Brown and Others* v. *Director of Public Prosecutions* (*The Times*, 17th April) the Divisional Court (the LORD CHIEF JUSTICE and CASSELS and DONOVAN, JJ.) have held that borough councillors who are also tenants of council houses are guilty of an offence under s. 76 of the Local Government Act, 1933, if they vote on housing matters. The resolution in question related to what is known as the "lodgers' levy" or payments by tenants to the council in respect of lodgers or sub-tenants. The councillors concerned had declared their interest, but had also voted. The section forbids voting by a member who has a pecuniary interest in the matter before the authority other than his right to participate in services, including the supply of goods, offered to the public. The court had little difficulty in finding that persons paying rent for houses had a pecuniary interest. Housing, it was also held, though in one sense a social service, was not a service within the meaning of the proviso. The public had no right to acquire a house, but only to get one if the local authority chose to give one. The legal decision could not have been otherwise, but the administrative difficulties that might be caused were largely minimised by the Minister's discretionary power under s. 76 of the 1933 Act to relax the restrictions when they threaten to prejudice the decisions of a council. The Minister stated in answer to a question in the Commons on 28th February that the policy normally followed by Ministers has been to allow councillor tenants of council houses to vote on questions affecting rents only where half or more of the members would otherwise be disqualified. He added that local authorities would be informed that he would sympathetically consider an application for removal of the disability to vote provided that the application was supported by a resolution of the council concerned.

"Threaten Them with Solicitors"

THE role of bogeyman is one that has been filled, knowingly or not, by many upright, inoffensive and unspectral citizens. The names of the Badger, the Toad, the Mole and the Water Rat, worthy creatures all, were shamelessly invoked by the weasels to subdue their young, and we ourselves remember as if it were yesterday the amiable grin of the coalman who consented to ascend three flights of stairs to terrify us into obedience long ago (he succeeded). Aware of this sort of thing, solicitors do not *mind* being used as a threat, but it does sometimes seem a little unfair that their prestige, their almost unique ability to give people uneasy twinges merely by existing as a profession, should be exploited so often and so successfully without their having any hand in the matter at all. The old story was told again recently in the *Manchester Guardian* by a writer who had felt that a certain company owed him £5. "Write them a tough letter," he was advised. "Show you mean business; threaten them with solicitors." This he did, but without effect. He then wrote saying that he had an appointment with his solicitors in four days' time over a house purchase. "This time a cheque for £5 came by return of post." One hopes that he will not feel as depressed as some writers in the Press have done by the costs of the house purchase.

Head over Heels

PERHAPS it was not to be expected that amid the current breaking of idols in Russia Soviet lawyers, especially dead Soviet lawyers, would all be left in one piece. Nevertheless, so conditioned are British minds to the cult of precedent, there may be some surprise at the legal criticisms levelled at the late Andrei Vyshinsky, chief prosecutor at the Soviet purge trials of the '30's, by the journal *Soviet State and Law*. It was, says that periodical, "a glaring violation" of Soviet law to condemn people on the basis of self-confession, and Vyshinsky's "mistaken theories" included that which "denies the need for a court to establish the absolute truth in each case." There has been "blind worship" of his works, with their "serious mistakes," and they have been received as "unimpeachable dogma." Thrusting aside the unquiet thought that if condemnation on the basis of confession were excluded from the English criminal courts there might be considerably fewer convictions than there are at present, we have to admit that everyone would find it great fun to overturn the lawyers—if only it were worth the expense of overturning the law. But as Marshal BULGANIN has said, "There are a number of subjects in regard to which we have not yet achieved mutual understanding."

MORE ABOUT ESTATE AGENTS' COMMISSION

It was emphasised in an earlier article (see *ante*, p. 80) that the elucidation of problems concerning an estate agent's right to remuneration involved two prerequisites: first to ascertain the precise terms of his mandate, and secondly to determine, on the true meaning of the mandate, the event upon the happening of which commission has been agreed to be payable.

Where the mandate has been reduced to writing either in the form of signed instructions or by correspondence, those questions resolve themselves into matters of construction. Again, where the mandate is created by specific spoken words it is necessary, although by no means easy, to ascertain with precision the words which were employed, in order that the proper construction can be placed upon them.

No express mandate

It may happen, however, that a principal does no more than request an estate agent "to act" on his behalf, and the question then arises as to the event upon which commission is payable, in the absence of any specific agreement between the parties.

In this connection it is as important to remember as it is often overlooked that even although no specific arrangement or discussion occurs in relation to the payment of commission, nevertheless the words used in the act of instructing the agent may determine the event upon which commission is payable.

Thus, a principal is far less likely to use the neutral phrase "Will you act for me?" than to say "Will you sell my house?" or "Will you find me a purchaser?" In such circumstances the commission is payable, in the absence of any contra-indication in the remaining evidence, in the one case upon the sale of the property, and in the other upon the finding of a purchaser. It will be necessary to examine these phrases to discover whether there is, in reality, any distinction between them.

It cannot be over-emphasised that in every case one must look both at all the circumstances and every word employed in order to gather the true extent and meaning of the mandate. Where the principal has said "Sell my house" he has used, in fact, an ambiguous phrase; a "sale," in one sense, may involve a completed purchase with the price duly paid; in another sense, it may only involve the signing of a binding contract to purchase. Thus, on the facts of *Peacock* v. *Freeman* (1888), 4 T.L.R. 541, the Court of Appeal held that the words "if the property is sold" only gave a right to commission on a completed sale, Lord Esher, M.R., observing, at p. 542: "Land could only be said to be sold when the conveyance was complete, not when there was a mere contract to sell." By contrast the Court of Appeal, some forty-three years later in *James* v. *Smith* [1931] 2 K.B. 317n, indicated that the phrase "if the business is sold" places the agent in the same position as to commission as one who has to introduce "a purchaser," and that to succeed the agent must show that a binding contract of sale, though not necessarily one which has been completed, has been entered into by a person who is able to perform it. This decision was followed in *Martin* v. *Perry and Daw* [1931] 2 K.B. 310, where the words used were "on a sale being effected"; and in *Luxor (Eastbourne), Ltd.* v. *Cooper* [1941] A.C. 108 Lord Russell of Killowen said, at p. 126, in relation to the position where "the matter has proceeded to the stage of a binding contract having been made between the principal and the agents' client . . . it can be said with truth that a 'purchaser' has been introduced by the agent." "Purchaser" is there used in the sense of a person to whom the property has been sold.

There would appear to be no reason to disagree with the conclusion drawn by the Court of Appeal in *James* v. *Smith*, *supra*, that the obligation "to sell" is equivalent to "finding a purchaser" and that both are satisfied only by reaching the stage of binding contracts of sale and purchase.

It is respectfully submitted that the law was correctly stated by the Court of Appeal in *Fowler* v. *Bratt* [1950] 1 All E.R. 662, where, after having referred to the above-quoted observations of Lord Russell in *Luxor (Eastbourne), Ltd.* v. *Cooper*, *supra*, and to Lord Romer's observations in the same appeal that "a purchaser . . . must mean at least a person who enters into a binding contract," Evershed, M.R., said, at p. 663, that Lord Russell was "expressing the view that where one has a bargain by which the agent has to introduce a purchaser, the agent, to earn his commission, must produce the result of a binding contract."

Sale not completed

In *McCallum* v. *Hicks* [1950] 1 All E.R. 864, Denning, L.J., said at p. 865: "When a houseowner goes to a house-agent and asks him to 'find a purchaser' that means that the agent is to find a person who will actually complete the purchase of the house, it being understood that the agent's commission is to be paid out of the purchase price. That is the common understanding of men in these matters. If the sale is not completed, the agent gets no commission unless he has procured an actual binding and enforceable contract to purchase." However, in *Dennis Reed, Ltd.* v. *Goody* [1950] 1 All E.R. 919, at p. 923, the same learned lord justice said: "Some confusion has arisen because of the undoubted fact that, once there is a binding contract for sale, the vendor cannot withdraw from it except at the risk of having to pay the agent his commission. This has led some people to suppose that commission is payable as soon as a contract is signed and I said so myself in *McCallum* v. *Hicks* [*supra*]. This, however, is not correct. The reason why the vendor is liable in such a case is because once he repudiates the contract, the purchaser is no longer bound to do any more towards completion, and the vendor cannot rely on non-completion in order to avoid payment of commission, because it is due to his own fault: see *Roberts* v. *Bury Improvement Commissioners* (1870), L.R. 5 C.P. 310."

With due deference to the learned lord justice and to Somervell, L.J., who by way of *obiter dicta* approved those observations in *Boots* v. *Christopher and Co.* [1952] 1 K.B. 89 (in which case Denning, L.J., re-affirmed his opinion), it is submitted that these statements of the law are demonstrably untenable. Attractive as it may seem to construe such phrases as "find a purchaser" and "sell my house" in conformity with the "common understanding" of the man on the Peckham omnibus, it remains true that when the construction falls to a court of law, it must proceed upon the bases of legal principle and precedent. The possibility must not be overlooked that the man on the Peckham omnibus in arriving at his understanding of the meaning of "sale" and "purchase" may not appreciate all the legal niceties, and the fact that, on exchange of contracts, the property passes in equity to the purchaser.

It is also significant that what has been conceived as "the common understanding of men" has not been found, as a matter of law, to accord with the understanding of a large number of Her Majesty's judges as expressed in decisions

and opinions upon the meaning of the same words in courts from the House of Lords down.

Secondly, where a principal is not permitted to " rely on non-completion [i.e., of the mandate] . . . because it is due to his own fault," the agent's claim, if anything, is not for commission, as Denning, L.J., asserts, but for damages for breach of contract. *Roberts* v. *Bury Improvement Commissioners, supra,* to which the learned lord justice referred, itself re-affirms this fundamental principle; in such a case commission cannot be recovered because the principal has prevented the event upon which it was payable. If damages are recoverable for breach of contract, it can only be for breach of an implied term that the principal would not prevent the agent earning his commission, which is precisely the implication which the House of Lords refused to make in *Luxor (Eastbourne), Ltd.* v. *Cooper, supra,* itself a case where the mandate was said to be one in which the commission was payable out of the purchase moneys on completion. Thus, if Denning, L.J., was correct in the Court of Appeal in 1950, then the House of Lords, by which he was bound, was wrong in 1941.

It remains to consider, on this aspect of the subject, what is the position of the agent in the case where the principal either uses the neutral phrase " Please act on my behalf " or otherwise does not specifically stipulate for a " sale," " a purchaser " or some similar event. As submitted in the earlier article (see *ante,* p. 80) it has never been any part of the function of estate agents to effect contracts of sale; their task has always been the effecting of introductions, and the person they have to introduce is " a purchaser."

" Readiness " to complete

The authorities already cited, besides many others, enable it to be asserted with some confidence that " a purchaser " is a person who has entered into a binding contract to purchase, which he is willing and able to complete. The word " ready " has been deliberately omitted from the definition of " purchaser " since, it is submitted, it is otiose and meaningless. In *Dennis Reed, Ltd.* v. *Goody, supra,* at p. 925, Denning, L.J., said that the person introduced has to be " ' ready,' i.e., he must have made all necessary preparations by having the cash or a banker's draft ready to hand over." It is again suggested, however, with due deference, that this is not correct. It seldom occurs that a purchaser upon signing his contract has the cash or draft then ready to hand over; often, he must raise a mortgage or realise securities, or complete the sale of another property. In *James* v. *Smith, supra,* Atkin, L.J. (as he then was), said: " I think that ' ability ' does not depend upon whether the purchaser has the money in hand at the time . . . I think it is sufficient if it is proved by the agent or by the purchaser that the circumstances are such that [the purchaser] . . . at the proper time [i.e., completion] could have found the necessary money to perform his obligation." The words in brackets have been added, but not only have Lord Atkin's words been adopted in many judgments, and never dissented from, but they were expressly followed by Lynskey, J., in *Dennis Reed, Ltd.* v. *Nicholls* [1948] 2 All E.R. 914 (a decision later overruled but on a different point). If, therefore, Denning, L.J., is correct that " readiness " must be proved in the sense of " having the cash or banker's draft ready to hand over," then " ability," which is the most vital attribute required in a purchaser, would be unnecessary, since that requires the less stringent condition, i.e., that the purchaser will, having regard to his status, investments or possessions, be able in the future to find the necessary money in time for completion. If one had proved the former, the latter would not arise.

To summarise, it is submitted that the situation is as follows: In the absence of any express mandate to the contrary, an estate agent who is engaged to act on behalf of a principal becomes entitled to commission when he has introduced a person who has entered into a binding contract to purchase, which he is not only unconditionally willing to complete at the proper time, but in respect of which it can then be shown that he will have the ability to complete when the time for completion arrives.

It has not been possible in the space available to examine the difficult considerations which arise from the question as to the precise moment at which " willingness " and " ability " must be considered, but the summary given is based upon the belief that, on the authorities, the facts must be determined at the moment when the mandate is performed, and where proceedings result, in the light of the evidence available at the hearing of the action.

Sole agency

It is possible to sympathise with the owner of property who, in his desire to secure an early sale, instructs as many agents as possible. It is, however, clear that he could achieve equally satisfactory results if he retained, for good consideration, a sole agent, leaving him to deal with other local agents on a shared commission basis. Such a practice, if generally followed, would save both owners and agents much of the worry and confusion now experienced—although, as will be observed, not necessarily all of it.

A principal who contracts with an estate agent that he shall have the sole agency for the sale of a property is precluded, whilst the agency subsists, from disposing of that property through any other agent (*Hampton and Sons, Ltd.* v. *George* [1939] 3 All E.R. 627). If he sells the property through another agent he is liable not for commission, since the mandate is still unperformed, but damages. The measure of damage which the agent will recover is not, however, necessarily equivalent to his full commission; it will depend upon the stage which he had reached in the negotiations and the probability of his having sold the property, had his instructions not been withdrawn (*ibid.; Trollope and Sons* v. *Caplan* [1936] 2 K.B. 382). The granting of a sole agency does not, however, preclude the owner from himself arranging a sale, so long as he does not effect the sale through another agent. A sole agency means no more than it says, namely, that no other agent will be employed (*Bentall, Horsley and Baldry* v. *Vicary* [1931] 1 K.B. 253).

As McCardie, J., indicated in the last-mentioned decision, different considerations apply if an owner, in unambiguous terms, grants an agent " the sole right to sell " since he is then undertaking that no one other than the agent (neither another agent nor he himself) will sell. Whilst, as always, each case turns upon its own particular facts, and whilst the position between vendor and purchaser is not necessarily the same as between principal and agent, it has been held in a case falling in the first category that the granting of a " sole selling *agency*" for goods precluded the owner from himself selling. The phrase, however, most often used by estate agents is " sole selling rights," and it is suggested that the use of such words, in the absence of any contrary indication in the mandate, effectively prevents an owner selling at all, except through the particular estate agent.

Every contract must be supported by consideration and estate agents' contracts are no exception. Often "sole agency" or "sole selling rights" agreements expressly stipulate the consideration. Thus, in *Bentall's* case, *supra*, the agents for their part agreed to bear a part of the expenses of advertising in the event of non-sale of the property. Sometimes agents merely promise to use their best endeavours; any such expressed consideration will suffice, since in English law consideration need only be good and need not be adequate.

In two decisions, *Christopher and Co.* v. *Essig* [1948] W.N. 461 and *Mendoza and Co.* v. *Bell* (1952), *Estates Gazette*, 12th April, neither of which found its way into the Law Reports, both Lewis, J., and Lord Goddard, C.J., appear, so far as the short available notes indicate, to have *implied* a promise by the estate agents to use their best endeavours. Their object was to found a consideration to support a sole agency contract. If this is so, it seems difficult to justify. It has been seen (*ante*, p. 79) that the House of Lords have said that there is no obligation upon an estate agent to do anything in pursuance of his mandate, and accordingly there is no contract which prevents the principal withdrawing the mandate, at any time before it has been performed.

Otherwise expressed, this means that if no promise or consideration moves from the agent there is no room to imply a promise or consideration moving from the principal, other than the promise to pay commission, *if and when* the mandate is executed. Why, therefore, a promise by the agent to use his best endeavours should be implied, in return for still further consideration moving from the principal, namely, the granting of the sole agency, is hard to follow. It would appear, therefore, that an express promise or other consideration is still essential.

The foregoing serves to show in what an extremely unsatisfactory state is this branch of the law. It is small wonder that laymen who have occasion to instruct estate agents seldom pause to consider their legal obligations, and that the few who do seldom, if ever, understand them.

It would be to the advantage of all parties, not excluding reputable agents themselves, if, when setting down for their principals the terms upon which they propose to act, they included a short letter or memorandum explaining in non-technical terms the circumstances in which commission or damages will be payable. It is to be hoped that the various professional bodies will urge this course upon their members.

DAVID NAPLEY.

THE COPYRIGHT BILL—AN INTERIM REPORT

THE Copyright Bill has now been sent down to the House of Commons. It was very fully debated in the House of Lords and a large number of amendments were proposed and a number were accepted by the Government.

While many of the amendments are of a formal or technical character resulting from recommendations by interested parties as to points of detail, there are also a number of amendments of substance. Enumerating these in the order of sections, the most important appear to be as follows:

Clause 2 (6) contains a new definition of those adaptations of a literary or dramatic work which constitute an infringement of the copyright therein. An interesting addition to such adaptations is a version in which the story is conveyed by means of pictures. This is directed to the modern development of publishing "cartoon" versions of well known literary or dramatic works. The novel provision in cl. 4 of the original Bill, providing a restrictive covenant to run with the copyright to prevent the work of employees or contributors being used except for the purpose for which it was made, is now abandoned. Clause 4 is now more nearly the same as the corresponding provisions of s. 5 of the Act of 1911, save that it reserves to journalists the book copyright in their contributions unless it is otherwise expressly agreed.

There is a new cl. 9 (5), providing that an artistic work shall not be infringed by its inclusion as a background of or incidental to a film or television broadcast. The performing right in records is now restricted under cl. 12 (7), where the performance is to residents of premises or as part of the activities of clubs or societies whose main objects are charitable or for social welfare. An important point is that the term of copyright in cinematograph films has been raised from twenty-five years to fifty years from first publication. It will be recollected that the Copyright Committee recommended a term of twenty-five years for all, what may be called, secondary copyrights; that is to say, copyrights involving a technical as distinct from a literary or artistic element such as gramophone records, photographs and films; but, while the others remain at twenty-five years, film copyright has been increased to fifty years, chiefly on the ground that it would otherwise unduly restrict the literary and dramatic copyright in the material which the film comprises.

A new cl. 14 (5) has extended the scope of indirect infringements of television and broadcast copyright, but, on the other hand, a new cl. 15 makes provision to secure that the same act shall not involve an infringement both of broadcast or television rights and of record and cinematograph film rights.

A new cl. 39 affords some security to schools against claims for infringement by reproduction or public performance in the case of material used for purposes of education. It will be appreciated that in a short article of this character the details of the amendments cannot be adequately summarised, and reference should be made to the Bill as now printed (Bill 115).

Since one of the matters which will immediately concern practitioners when the Bill becomes law is its effect upon existing works, it is perhaps worth while to point out that the present Bill deals quite differently with the copyright in existing material from the manner in which this problem was dealt with in the Act of 1911. That Act provided simply that if a work was entitled to copyright under the pre-existing law at its commencement, then the work should thereafter enjoy copyright in accordance with the Act of 1911. The new Bill, on the other hand, proceeds on the basis that the Bill confers copyright in accordance with its provisions on all works whenever created and without regard to the previous law. This is then qualified by elaborate provisions in the Fifth Schedule, which modify the clauses of the Bill in respect of works in existence before the Bill or in respect of transactions effected before the commencement of the Bill. Some of these variations take the form of substituting for clauses of the Bill the similar sections of the Act of 1911 and some substitute other provisions intended to modify the similar provisions of the Act of 1911. It will be appreciated that this produces a complicated situation and a number of the recent amendments of the Bill are concerned with the Fifth Schedule.

F. E. SKONE JAMES.

BIGAMY BY ORDER OF THE COURT

THE decision of the Court of Appeal in the case of *Farrow* v. *Farrow* (*The Times*, 14th December, 1955) is one of those which one feels must be right yet must be wrong. That the decision of their lordships was within the powers of the existing law there can be no doubt; but the result is most curious.

Briefly the facts were as follows: the husband instituted proceedings for a decree of nullity, but the parties continued to live in the same house. Service was effected by post and in getting the wife's signature to the receipt he explained that he had started proceedings in a fit of temper and would have them stopped immediately; and similar excuses followed every time the wife's signature was required. In due course at the hearing the suit was undefended, and it was not until some time after the decree absolute that the wife discovered the trick that had been played on her. She applied for leave to appeal out of time and for a new trial, and the Court of Appeal granted it. The husband remarried after the decree absolute was granted. If, now, the first wife successfully defends her cause at the retrial her husband will seemingly have committed bigamy, but only as a result of the judgment of the court.

The jurisdiction of the Court of Appeal comes from s. 31 (1) (*e*) of the Supreme Court of Judicature (Consolidation) Act, 1925, which says: "No appeal shall lie . . . (*e*) from an order absolute for the dissolution or nullity of marriage in favour of any party, who, having had time and opportunity to appeal from the decree *nisi* on which the order was founded, has not appealed from that decree." The exercise of this power was discussed in an article "Appeal from a Decree Absolute" (97 SOL. J. 53), written just over a fortnight before the decision in *Wiseman* v. *Wiseman* [1953] 2 W.L.R. 499.

The idea behind the wording of the Act is that natural justice must be preserved. The conflicting rights that are revealed when such ideals are measured against personal status make one of the most finely balanced see-saws upon which the courts have had to sit. Many will remember the decision in *Wiseman* v. *Wiseman*. This was a somewhat similar case to *Farrow* v. *Farrow* except that it was divorce and that the wife did not hear of the proceedings because substituted service was ordered. In that case the husband had remarried and had a child. Somervell, L.J., said: "Whatever the decision in the present case, the status of one or other of the women will be affected in a manner repugnant to the law . . ." Either the first wife would be deprived of a husband without a chance of defence; or the second would be told she had never been married and her child was illegitimate. Denning, L.J., said he did not think that the avoidance of the second marriage related back so as to make the child illegitimate; but it is submitted that so far as the first wife was concerned the husband was either married or not married and accordingly the child could have been either illegitimate or legitimate. If one is to accept the proposition that the child could have been born legitimate, then the subsequent order revoking the decree absolute takes effect as if it were a remarriage; and it is no ordinary marriage. It is a marriage between parties who do not consent, performed by a person (the judge) not qualified to perform marriages, without banns or licence in a place not registered for marriages. The balance in fact lies between the rights of the first wife on the one hand, and the rights of the second wife, her children, and declaring the husband a bigamist on the other hand.

The decision in *Igra* v. *Igra* [1951] P. 404 does not appear to be entirely irrelevant in this connection. The facts were virtually the same again but the decree had been pronounced absolute in Berlin in 1942. Pearce, J., granted a declaration that the marriage had been validly dissolved (notwithstanding non-service of the respondent), saying: "The interests of comity are not served if one country is too eager to criticise the standards of another country or too reluctant to recognise decrees that are valid by the law of domicile." Thus the courts will uphold a decree for the sake of comity, but not for the sake of the individual people affected by them.

The conclusion that one must reach is that, as the law stands at present, a person who has remarried after divorce is only conditionally married and the children may only perhaps be legitimate. Denning, L.J.'s *dictum* that the children must be legitimate whether or not their parents were legally married can only be accepted with reserve. It would seem that to obtain a satisfactory state of the law sub-para. (*e*) of s. 31 must be deleted; and to balance the equity either the Queen's Proctor must be far more active (which is hardly practicable) or the respondent must appear in court in person in every case; and even then errors will occur somehow. Alternatively, the rights of a spouse who has been "secretly" divorced must be confined to custody and alimony, etc., and not include status as well, as is the present practice.

N. P.

DEVELOPMENT PLANS

COUNTY BOROUGH OF SOUTHEND-ON-SEA DEVELOPMENT PLAN

On 4th April, 1956, the Minister of Housing and Local Government approved with modifications the above development plan. A certified copy of the plan as approved by the Minister has been deposited at the Town Clerk's Office, Municipal Buildings, Clarence Road, Southend-on-Sea. The plan so deposited will be open for inspection free of charge by all persons interested between the hours of 8.45 a.m. and 5.30 p.m. on week-days and 8.45 a.m. and 12.15 p.m. on Saturdays. The plan became operative as from 12th April, 1956, but if any person aggrieved by the plan desires to question the validity thereof or of any provision contained therein on the ground that it is not within the powers of the Town and Country Planning Act, 1947, or on the ground that any requirement of the Act or any regulation made thereunder has not been complied with in relation to the approval of the plan, he may, within six weeks from 12th April, 1956, make application to the High Court.

CITY OF LEICESTER DEVELOPMENT PLAN

On 28th March, 1956, the Minister of Housing and Local Government approved with modifications the above development plan. A certified copy of the plan as approved by the Minister has been deposited at the Town Clerk's Office, Town Hall, Leicester. The copy of the plan so deposited will be open for inspection free of charge by all persons interested between the hours of 9.30 a.m. and 12.30 p.m. and 2.30 p.m. and 5.30 p.m. on Mondays to Fridays and between 9.30 a.m. and 12 noon on Saturdays. The plan became operative as from 17th April, 1956, but if any person aggrieved by the plan desires to question the validity thereof or of any provision contained therein on the ground that it is not within the powers of the Town and Country Planning Act, 1947, or on the ground that any requirement of the Act or any regulation made thereunder has not been complied with in relation to the approval of the plan, he may, within six weeks from 17th April, 1956, make application to the High Court.

A Conveyancer's Diary

TRUSTEES' POWERS OF INVESTMENT

FIFTY, even twenty-five, years ago there was little difficulty. In discussing his desires with a testator or settlor it could almost be assumed, unless the property to be dealt with was very large or very special, that the trustees' power of investment would be a narrow power, limited to trustee securities. If any modification of that power was desired it was, as often as not, a restrictive modification. The settlor might have memories of troubles on the other side of St. George's Channel and object to real securities in Ireland, when those were within the range of investments permitted by the Trustee Acts; or some unfortunate experience overseas might make him doubt the wisdom of trusting his money to some of the stocks authorised by the Colonial Stock Acts. But by and large the statutory power met the needs of the average man of moderate fortune.

This is all changed now. Apart from the vagaries of the stock market since the last war, which nobody needs to be reminded of, the statutory range of trustee investments has suffered considerable contraction in that period. Nationalisation of transport and gas and electricity undertakings has substituted for what used to be a popular range of investments of considerable diversity, blocks of uniform stocks which are anything but popular with the investor (since people are constantly selling, say, transport stock, there must be buyers for it, but I have never met one in private life). And until very recently local authorities were not permitted to borrow in the open market, and the supply of another useful range of trustee investments was thus for a longish period turned off at the source.

As a result (and whether it was the advice which solicitors gave to their clients, or the desires which the clients confided to their solicitors, which was the prime cause it is unnecessary to speculate) instead of a very narrow investment power it has become a habit to provide for the widest possible power. The wording differs from one book of precedents to another, but the effect is to confer on the trustee a power to invest or apply trust moneys in any property of any description and wherever it may be situated, as if the trustee were the beneficial owner. (The reference to application as well as to investment of trust moneys is the recognised method of circumventing the decision in *Re Power* [1947] Ch. 572, where it was held that a power to invest *simpliciter* did not authorise the purchase of property to be enjoyed *in specie* by a beneficiary—in that case, a house to be occupied by a life tenant.)

Protection of trustee with wide express powers

But a very wide power of this kind puts a heavy responsibility on the trustee. Every power, whether it is narrow or wide, has to be exercised in a trustee-like manner, and an error of judgment may lead to the trustee being charged with any loss which may arise therefrom. Inevitably the opportunity of committing an error of judgment leading to such loss as could be charged against a trustee is far less likely to occur where the range of permitted investments is narrow, and a trustee who is asked to assume the heavier responsibilities attaching to a very wide power of investment is entitled to protection against the consequences of an error of judgment if unaccompanied by *mala fides*. The form which such protection now commonly takes is an indemnity contained in the trust instrument to the following effect (I take this form from Prideaux's Precedents in Conveyancing, 24th ed., vol. III, p. 156): "In the professed execution of the trusts and powers hereof no trustee shall be liable for any loss to the trust premises arising by reason of any improper investment made in good faith . . . or by reason of any other matter or thing except wilful and individual fraud or wrongdoing on the part of the trustee who is sought to be made liable." The note to this form in Prideaux reminds one that this clause is for use in special cases, and that in some cases, e.g., where the investment clause is wide, trustees refuse to act unless expressly indemnified, not being content to rely upon the indemnity afforded by s. 30 of the Trustee Act, 1925. That is a very fair statement of the applicability of this or any similar clause. There is no reported case on its effect and operation, but it has been considered by the court in at least one case in the last few years, and full effect was then given to its very wide (and very plain) language. With a clause like this it is impossible to charge a trustee with the consequences of a mis-investment unless it is accompanied by fraud.

A middle course

That is satisfactory for the trustee, but a settlor who is making the best provision he can for his dependants may reasonably think that a wide power with a wide indemnity leaves too much to fortune. In such a case it seems to me well worth while considering some compromise between the extremes of the narrowest and the widest powers, such as is contained in Sched. III to the Coal Act, 1938. Compensation moneys payable under that Act could in certain circumstances become liable to be invested, and para. 21 (5) of Sched. III provides the following range of investments in addition to the usual trustee securities. First, stock or other securities of any local authority in the United Kingdom (contrast this with the more limited power contained in s. 1 (*m*) of the Trustee Act, 1925, which enables trustees to purchase only stock of municipal boroughs in the United Kingdom with a population of over 50,000 or any county council). Secondly, stock, shares or other securities of certain statutory undertakers (as a result of subsequent legislation this now means, largely, the boards running the nationalised undertakings, and this head is not therefore now of great practical importance). Thirdly, the debentures or debenture stock, or the preference or guaranteed stock or shares of any company incorporated by or under a special or a general Act, or incorporated by Royal Charter, being a company which has paid dividends upon its ordinary capital at the rate of at least 3 per cent. per annum for at least five years next before the time of investment; of this fact a letter purporting to be signed by the secretary of the company, or by a banker or a member of a firm of bankers, or by the secretary or manager of a joint stock bank or any branch thereof, is to be sufficient evidence. Except that this head includes a power to purchase participating preference shares of the companies therein referred to it is not, perhaps, a particularly useful power at the present time; the really useful power is the last one. This, the fourth head, comprises the ordinary or other stock or shares of any company incorporated as

aforesaid, being a company which has paid dividends at the rate of at least 4 per cent. per annum for at least the ten years next before the time of investment; and of this fact a similar letter is to be sufficient evidence. The powers conferred by this paragraph of the Schedule do not extend to bearer securities or to securities on which there is a liability for calls, and they are exercisable subject to any relevant consents.

A power to invest in securities "authorised by law for the investment of trust funds or any of the other securities or investments mentioned in para. 21 (5) of Sched. III to the Coal Act, 1938, subject to the provisions of that paragraph" would thus give a very fair range of investments with, at the same time, a reasonable degree of protection against any catastrophic loss by mis-investment. A trustee who is asked to act and exercise such a power would probably require for himself the additional protection of an express indemnity of the kind already mentioned, but balancing one thing with another a settlor should be prepared to give that: the shares of companies with a good recent dividend record of the kind specified in the 1938 Act are hardly likely to become valueless overnight unless some national calamity should occur. And no private person can be asked to legislate for that.

Classified and proportioned investment powers

Another possibility is to divide the investments to be authorised into categories and to specify the proportions in which the various categories of investments are to be held. A simple and eminently practicable example of an investment power on these lines is to be found in the enlarged power which was authorised by the court in *Re Royal Society's Charitable Trusts* [1955] 3 W.L.R. 342. This permitted the investment of trust moneys, in addition to the range of investments authorised by the general law for the investment of trust moneys (thereinafter referred to as "the authorised range"), in (i) Government securities of the United States of America or any State thereof, or (ii) the debentures or debenture stock, or preference, ordinary or deferred shares or stock, of any company incorporated in the United Kingdom or under the laws of the United States of America or any State thereof, subject to several provisos of which two are important and to some extent novel: first, that no funds should be invested upon any investment not within the authorised range which is not dealt in or quoted upon a recognised stock exchange in the United Kingdom or in the City of New York; secondly, that no funds should be invested outside the authorised range if the value of the investments in the trust which should be within such range should then be or would thereby become less than one-third of the value for the time being of all the investments and money in the trust. Two other provisos prohibit investments on which there may be calls and specify the size of any company in which investment is permitted respectively.

A study of these various powers and particularly of the limitations and prohibitions to which they are subject should make it possible for the draftsman when he is discussing a settlement with the settlor to offer a more diverse range of investment powers than most of the books provide. The condition in the power in the *Royal Society's* case for a minimum holding of trustee securities at all times is one which I think is likely to be particularly attractive to the settlor or testator making provision for dependants who have no other provision in life; what the minimum is to be would always be a matter for discussion. If the decision in *Re Power* is then also remembered, and if necessary steps are taken to avoid its application, a practicable investment power suitable for the times in which we live and the needs of most settlors should be possible.

"A B C"

Landlord and Tenant Notebook

GOLD CLAUSE REDDENDUM

In *Treseder-Griffin* v. *Co-operative Insurance Society, Ltd.* [1956] 2 W.L.R. 866 (C.A); *ante*, p. 283, the Court of Appeal reversed the decision of Goddard, L.C.J. ([1955] 3 W.L.R. 996; 99 Sol. J. 912), Harman, J., dissenting, though favouring some variation of the order made. It may be recalled that the learned Lord Chief Justice, whose decision was discussed in our issue of 21st January last (*ante*, p. 46), himself expressed his pleasure at the thought that his judgment could and no doubt would be considered by the Court of Appeal and perhaps the House of Lords.

The question considered at first instance was whether the reddendum of a particular lease entitled the lessors to payment in since depreciated currency or to the value in currency of a number of gold sovereigns if sold to an authorised dealer; on appeal, the dissenting judgment above mentioned brought out the existence of a second alternative, the value of the intrinsic gold content of those sovereigns. And as, in my submission, the question (though illegality and public policy considerations were mentioned) was essentially one of the interpretation of words in a document, I propose to recall the actual wording of the reddendum, setting it out twice, but italicising different words; in the case of (i), these italics emphasise what appears to have been most important in the eyes of Denning, L.J.; in the case of (ii), what most affected Morris, L.J., and Harman, J. (i) "Paying therefor yearly during the said term either in *gold sterling* or Bank of England notes to the equivalent value in gold sterling the rent of £1,900 . . . by equal quarterly payments on the usual quarter days"; (ii) "Paying therefor yearly during the said term either in gold sterling *or* Bank of England notes to the equivalent *value* in gold sterling the rent of £1,900 . . ."

Currency or commodity?

The main point in Denning, L.J.'s judgment was, I think, that expressed by the learned lord justice's "A man who stipulates for a pound must take a pound when payment is made, whatever the pound is worth at that time."

What the reddendum meant was, according to this judgment, that the lessees were to pay £1,900, not the gold content (or the "hoarding") value of £1,900: it was money, not a commodity, that was reserved. If I may refer to the "Notebook" for 21st January last, I find that I laid some stress on the fact (or view) that what was reserved was a money rent, and not a rent consisting of any of the heterogeneous collection of articles enumerated by Coke.

Denning, L.J., referred to *Feist* v. *Société Intercommunale Belge d'Electricité* [1934] A.C. 161, and the test therein propounded by counsel: "Is the intention of those words to fix the amount to be paid, or to determine the manner in which an amount already fixed is to be discharged?" In that case the holder of a bond providing for payment "in sterling gold coin of the United Kingdom at or equal to the standard of weight and fineness existing on 1st September, 1928," was held to be entitled to gold value. But the importance attached to the passage (which is founded on the *intention* expressed) shows, in my submission, that *Treseder-Griffin* v. *Co-operative Insurance Society, Ltd.* is essentially a decision interpreting an instrument, and Denning, L.J.'s point was that in the case before the court the lease prescribed mode, not measure.

Illegality: public policy

The judgment of Denning, L.J., also referred to the effect of the Coinage Act, 1870, s. 6; the learned lord justice said that this enactment made it unlawful for a creditor to stipulate for payment of a money debt in any other way than in lawful currency. The section says: "Every contract, sale, payment . . . and security for money, and every transaction, dealing, matter and thing relating to money, or involving the payment of or the liability to pay any money . . . shall be made, executed, entered into, done and had according to the coins which are current and legal tender in pursuance of this Act . . ." The learned lord justice opined that the section made it unlawful to stipulate *for a money debt* in any other way than in lawful currency. The validity of leases reserving payment in kind was accepted, but Denning, L.J., supported his opinion by reference to rules as to certainty, as to rent becoming due in the morning but not in arrear to midnight, and to the necessity for demand made. This part of the judgment, in my respectful submission, seeks to apply to the law relating to rent in general what applies only to that relating to forfeiture for non-payment. And later, Harman, J., citing *Adelaide Electric Supply Co.* v. *Prudential Assurance Co.* [1934] A.C. 122, said that the meaning of the Coinage Act, 1870, was obscure. Morris, L.J., made a similar observation.

Nor can I quite reconcile Denning, L.J.'s recognition of the validity of rent in kind with an earlier passage in his judgment suggesting that gold clauses for internal payments could not be valid: "We might find every creditor stipulating for payment according to the price of gold; and every debtor scanning the bullion market to find out how much he has to pay." The effect of this would, apparently, be that if the rent were, to quote Coke, "in delivery of hens, capons, roses, spures, bowes, shafts, horses, hawkes, pepper, comine, wheat" *simpliciter*, the reddendum would be enforceable; if it provided for a money payment calculated by reference to the value of those commodities, so that tenants would be scanning the poultry market, etc., quotations to find out what they had to pay, it would be illegal. Harman, J., when he came to deal with the public policy difficulty, pointed to the Settled Land Act, 1925, s. 45, authorising in the case of a mining lease rent ascertainable by reference to the quantities of mineral gotten and varying according to the *price* of the minerals gotten. There does not, I respectfully suggest, seem to be any compelling reason why a landlord should not let, say, a shop to a grocer by a lease reserving payment in golden syrup or its current price.

Equivalent value

Morris, L.J., subjecting the lease to a very close examination, stressed differences between the provision under review and that upheld in *Feist* v. *Société Intercommunale Belge d'Electricité*: the absence of any option, and of any specification of weight and fineness in a lease made when gold sovereigns (not mentioned) though not in circulation were legal tender; nor had there been any evidence as to the extent of their sale at the present time. But apart from this, there were "certain considerations" suggesting that, *in its context*, the word "value" must be interpreted as meaning nominal value; and the learned lord justice specified eight such considerations. These consisted largely of the phrasing of other parts of the lease: the covenant to pay rent was to pay "the reserved rent" without deduction except for landlord's property tax, etc., and by equal quarterly payments, the fact that one of the payments worked out at a sum ending in 17s. 6d., the odd 7s. 6d. of which could not be paid in Bank of England notes, etc., all tended to show that what was *intended* was payment of £475 per quarter.

Harman, J., after stressing the point that intention was what mattered, considered that as the language used was ambiguous, the court was not only entitled but bound to inform itself of "the situation of the contracting parties and the circumstances existing when the contract was made." At that time the then lessees had held under a lease with a similar reddendum, its term being subsequently merged in the one created in 1938. The earlier lease had run from Midsummer, 1930—when we were on the gold standard, remaining thereon till 1931. Then it was clear that there was an intention to produce "the effect of" a gold clause; if £1,900 were intended in all circumstances to be the measure of liability, the words about gold sterling might as well have been omitted. Harman, J., could not agree to a course which would deprive those words of all effect. He did not consider that the price obtainable from an Exchange Control Act, 1947, authorised dealer could be considered as what had been within the contemplation of the parties, part of that price being enhanced by an artificial demand created by persons anxious to hoard golden sovereigns; but he did think that, in spite of the absence of references to gold sovereigns or to weight and fineness, "value" meant intrinsic value.

No one would, of course, blame draftsmen preparing an instrument in 1938 for not foreseeing all that might happen between then and 2029, but it cannot be said that the decision is the best illustration that could be provided of how a landlord parting with his land for a long term of years may best protect himself against fluctuations in the value of money.

R. B.

The 8th annual summer course in English Law and Comparative Law will be held at the City of London College, Moorgate, E.C.2, from 16th July to 10th August, 1956. Dr. Clive M. Schmitthoff will be in charge of the course. The course is arranged for lawyers and law students from overseas and it is further suitable for English students preparing for the study of law. The syllabus of study-group A is designed for those who wish to acquire a knowledge of modern English law; the syllabus of study-group B includes subjects of particular interest to those who have some knowledge of Anglo-American Common Law. In seminars, which are conducted according to modern methods of teaching comparative law, legal institutions of particular interest are discussed from the point of view of English and foreign law. Special talks on matters of topical interest are provided, and during the afternoons and at week-ends inexpensive trips are arranged to places in or around London. Prospectuses can be obtained from the Secretary, The City of London College, Moorgate, E.C.2.

HERE AND THERE

UGLY CUSTOMER

THE intricate system of sound signals and their rendering into script, which we call language and which (barring extra-sensory perception) is the sole means by which each of us, irrevocably isolated from birth to death in his own private prison of flesh, can communicate with another, leaves a very wide margin for error and possible misinterpretation. Conveying just what you mean is one of the hardest of the arts to master and, even when you've done a pretty good best, any fool can misunderstand you and most fools do. Yet, as Confucius once said, "If language is not correct, then what is said is not what is meant; if what is said is not what is meant, then what ought to be done remains undone; if this remains undone, morals and arts will deteriorate; if morals and arts deteriorate, justice will go astray; if justice goes astray the people will stand about in helpless confusion. Hence, there must be no arbitrariness in what is said. This matters above everything." On this high note we can worthily approach the problem of the catfish and its alias, as lately propounded to the magistrates of Nottingham. Nature, it seems, while endowing the catfish with a voracious appetite, did not design it æsthetically as a *bonne bouche*. So, when the fishmongers discovered, to their surprise, that it was not only edible but nutritious, having (in current dietetic jargon) "a high calorific and protein value," they were confronted with the problem how to make the edible saleable. Now, more than half the success of salesmanship is charm, and charm is not synonymous with deceit. Deceit is of necessity a short-term policy; charm grows on you, and some means had to be found of endowing this particularly fearsome-looking denizen of the deep with gastronomic charm. The English will swallow most things that come out of a tin, provided it is adorned with a pretty picture label, but not Landseer himself could have idealised the face and figure of the catfish. Abroad, the task would not have been so difficult, since foreigners have more stomach than we for culinary adventure. As Belloc sang:—

> "Alas! What various tastes in food
> Divide the human brotherhood!
> Birds in their little nests agree
> With Chinamen, but not with me.
> The French are fond of slugs and frogs
> The Siamese eat puppy-dogs.
> In Italy the traveller notes
> With great disgust the flesh of goats
> Appearing on the table d'hôtes
> And even this the natives spoil
> By frying it in rancid oil."

The octopus or cuttle-fish with all his eight arms has never really caught on to the English table, though you may meet him familiarly in Spain.

MOCK OR DELUSION?

For the fishmongers the transmogrification of the catfish presented very special difficulties. It could not be persuaded to blush a cheerful red like the lobster or the crab. It has no recommendation like the glamorous association of the oyster with the pearl. Even when beheaded, skinned and filleted (a beauty treatment which went to the limits of the drastic) its unfortunate name still remained and even its other official title of wolf-fish was not really any more appetising. But in our social and political life it is a commonplace to change the name of an institution or practice, so why not when we name fish? (And there is more sense in that than occurs to the strictly logical brain. Would the present Princess of Monaco, with all her charm, have attained her present exalted station had she been born and remained Miss Wilhelmina Whakenpuffer? One doubts it.) So the catfish became "rockfish," "Scotch halibut" or "mock halibut fillets" according to the fancy of the vendor. It was under the last of these titles that it swam into the ken of the Nottingham housewives and became a bone of contention in the magistrates' court there, for the fishmonger was prosecuted on the ground that the title was "calculated to deceive his customers." Nothing was lacking in the ruthless realism of the proceedings. At a signal from the food inspector, an assistant brought into court a great tray displaying three halibuts in all their pristine beauty and a catfish. "Hideous," exclaimed the inspector, holding it aloft. "I think it's an abomination." Counsel for the defence made a counter-signal and this time a tin of mock turtle soup appeared. Was this, he asked, calculated to deceive? And if no one really thought that there was turtle in mock-turtle soup, would anyone imagine that there was indeed halibut in "mock halibut"? There he had the dictionary on his side, for "mock" means "imitating reality but not real." The wretched catfish was laying claim to nothing that was not his own; he was not filching the aristocratic halibut's patent of nobility. The most pedantic official at the College of Arms would not arraign for social counterfeit a man who called himself the Mock Earl of Tooting. Both the mock earl and the mock halibut obviously belong to the music hall world and the sapient magistrates acquitted fish and fishmonger alike of all deceitfulness. Said the chairman: "The label was not calculated to deceive the ordinary man or woman—myself." One is grateful for the vigilance of those who watch over the designations of that which the shopkeepers expect us to swallow, but here, perhaps, was an excess of zeal, like that of the official who tried to make the sherry importers abandon the name of Bristol Cream as being suggestive of nutritious qualities which it did not possess. But why don't the fishmongers adopt the simple device which serves the restaurateurs so well? The public will swallow anything with a French name on a menu. Why not in the fish shop? Call the beast "loup marin." Give it a completely fresh "write up" by one of the journalistic gastronomes and soon it would be in greater demand than cod with not the remotest risk of a prosecution. One offers the idea with compliments to the White Fish Authority. Culture pays if judiciously employed in small quantities.

RICHARD ROE.

Out of 337 candidates in The Law Society's Final Examination held on 12th, 13th, 14th and 15th March, 173 passed. The Council have awarded the following prizes: to PETER ROSS MILLIGAN, LL.B. Leeds, the Sheffield Prize, value £39; and to CHRISTOPHER HUGH DAVIDSON the John Mackrell Prize, value £15.

A. Ll. Armitage, Fellow of Queen's College, Cambridge, will discuss on 7th May, in the next talk in the "Law in Action" series in the B.B.C.'s Third Programme, the limitations of the criminal law concerning the dishonest appropriation of property.

CORRESPONDENCE

[The views expressed by our correspondents are not necessarily those of "The Solicitors' Journal".]

Advertising by Solicitors

Sir,—Is it not time that The Law Society paid some attention to the "advertising" by members of the profession or, to use a stronger word, "touting," which is becoming more and more prevalent every month?

I refer to the ever-growing practice of solicitors putting up a nameplate at their home addresses indicating their profession, where no office exists at all, their practice in reality being carried on elsewhere. Even more deplorable is it when the nameplate also bears the name of a firm, whether or not the individual is a member of it.

It is quite a different thing for the nameplate of a doctor or dentist to be put up at his home address where he also carries on his profession. I am glad to say that so far I have not seen a similar indication by a member of the chartered accountants' profession.

There can be only one object in this attempt at self-advertisement—as I have said more than ever distasteful when the name of a firm also appears—and I am sure that the elimination of this practice without delay is much to be desired in the best interests of our profession. My observations lead me to the conclusion that it is happily not carried out by individuals or firms who are of a high standing in the profession and who have no need to have recourse to it in an attempt to increase their practice.

SOLICITOR.

Manchester.

The Duchess of Kingston's Case

Sir,—In the Landlord and Tenant Notebook for March 31st some reference is made to *The Duchess of Kingston's Case*, and your contributor, R. B., states that "the net result being that the lady was not a duchess at all but just plain Mrs. Hervey, a commoner," and the House of Lords had no jurisdiction.

I am afraid the matter is more complicated than that. I speak from recollection, but I think I am correct in saying that the position was that Elizabeth Chudleigh, maid of honour in the court, married Captain Hervey, as he was then, secretly in 1744. In 1768, both parties being desirous of getting rid of the marriage, and the lady wishing to marry the Duke of Kingston, the proceedings in the Consistory Court took place. Subsequently Captain Hervey, who had been a younger son of a noble family, inherited the title, and the lady having found life with the Duke of Kingston unsatisfactory, desired to re-establish herself in an alternative noble position. There was some suggestion that in fact the proceedings were "rigged" to serve the equivalent of a divorce and remarriage. However, as, whatever the outcome of the trial, the lady was undoubtedly a peeress in one capacity or another, there is, I think, no doubt that the House of Lords had jurisdiction.

I apologise for not being able to cite my authorities, but I did not think the point worth any special research.

London, W.1. T. W. PINNOCK.

R. B. writes: I think that some research on *my* part is called for. The short report in 1 Leach 146 sufficed for Denning, L.J.'s purpose; but other sources of information show that your correspondent's strictures are well founded. In "The Trial of Elizabeth, calling herself Duchess Dowager of Kingston, for Bigamy, before the Right Hon. the House of Peers," etc., 20 St. Tr. 355, which occupies nearly three hundred pages, the accused is repeatedly described as "Elizabeth the wife of Augustus John Hervey"; e.g., in the indictment; but a clue is given in an utterance by the Lord High Steward (p. 370) showing that she had averred that A. J. H. "is at this time earl of Bristol," and had petitioned for a trial by her peers. And reference to the House of Lords Journals for 1775 and 1776 (vol. 34) shows that the point was actually taken and decided before the trial. The latter began on 15th April, 1776; on 22nd December, 1775, the House had been concerned with a motion in which the lady was called "the Wife of the Honourable Augustus John Hervey (now Earl of Bristol, one of the Peers of this Realm)" and it was on 29th February, 1776, that the judges were consulted, it being clear that the alleged husband had become Earl of Bristol *since* the indictment. The judges advised in favour of the accused petitioner, who was accordingly granted the privilege of being tried by her peers; from whom, the Lord High Steward added, "you will be sure to meet with nothing but justice tempered with humanity." Rather a reflection on other courts!

Judge Making

Sir,—Richard Roe's comments on "Judge Making" in your issue dated the 31st March omit one interesting consideration, namely, that in our system judges are promoted from the barristers' branch of the profession alone. It follows that they are lawyers who have had only limited opportunities of direct contact with lay clients and are also probably more experienced at "putting cases" than weighing them up or "sizing up" people.

This has, I suggest, certain consequences. The remoteness of their experience is, perhaps, the explanation of the theory frequently asserted that our judges as a body are reluctant to move with the times and have consequently opposed most legal reforms. Judges, for example, have had much to say as to the deterrent effect of capital punishment, but I suggest that a solicitor who has acted for a man accused of murder is better able to assess this matter than a barrister, no matter how eminent.

Similarly, is it not possible that the pettifogging niceties of distinction that often make the laymen distrust our law may be the outcome of appointing as judges only those trained primarily to argue and differ and never those experienced mainly in seeking a satisfactory result for the common benefit.

The President of The Law Society has recently said:

> "Surely no body of men other than solicitors can acquire so great a reservoir of information about where the law operates harshly or is outmoded."

It is difficult to see why members of this body should not be eligible for promotion to the Bench and so able to influence the development of our law.

Leicester. C. D. GEACH.

GRAY'S INN

On 18th April, being the Grand Day of Easter Term, 1956, the treasurer, Sir LEONARD STONE, O.B.E., and the Masters of the Bench, entertained to dinner in Hall the following guests: The Right Hon. The Earl of Woolton, C.H., Commander of the Northern Air Materiel Area, Europe (Brigadier-General Troup Miller, U.S.A.F.), The Right Hon. The Lord Morton of Henryton, M.C. (a Lord of Appeal in Ordinary), The Right Hon. Lord Justice Jenkins, the chairman of the British Broadcasting Corporation (The Right Hon. Sir Alexander Cadogan, O.M., G.C.M.G., K.C.B.), the chairman of the British Transport Commission (General Sir Brian Robertson, Bt., G.C.B., G.B.E., K.C.M.G., K.C.V.O., D.S.O., M.C.), and the Gentleman Usher of the Black Rod (Lieutenant-General Sir Brian Horrocks, K.C.B., K.B.E., D.S.O., M.C.).

The Benchers present in addition to the treasurer were: The Hon. Mr. Justice Hilbery, Mr. N. L. C. Macaskie, Q.C., Sir Arthur Comyns Carr, Q.C., The Hon. Mr. Justice McNair, The Hon. Mr. Justice Sellers, M.C., The Hon. Mr. Justice Barnard, The Right Hon. Sir Hartley Shawcross, Q.C., M.P., Sir John Forster, K.B.E., Q.C., Mr. Michael Rowe, C.B.E., Q.C., The Hon Mr. Justice Devlin, The Right Hon. The Lord Reid, LL.D., F.R.S.E., Sir Denis Gerrard, Mr. George Pollock, Q.C., The Right Hon. Sir Lionel Leach, Q.C., Mr. A. P. Marshall, Q.C., Sir Edward Maufe, R.A., F.R.I.B.A., Mr. R. C. Vaughan, O.B.E., M.C., Q.C., Mr. G. W. Tookey, Q.C., Mr. Dingle Foot, Q.C., His Excellency Mr. Justice Read, The Right Hon. L. M. D. de Silva, Q.C., Mr. David Karmel, Q.C., Mr. Christopher Shawcross, Q.C., Sir Hersch Lauterpacht, Q.C., with the Preacher (The Rev. Canon F. H. B. Ottley, M.A.), and the under-treasurer (Mr. O. Terry).

NOTES OF CASES

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Judicial Committee of the Privy Council

CEYLON: CRIMINAL LAW: PERJURY: IMPRISONMENT: MISCONCEIVED PROCEDURE

Subramaniam *v.* R.

Lord Oaksey, Lord Tucker, Lord Cohen, Lord Keith of Avonholm, Mr. L. M. D. de Silva. 10th April, 1956

This was an appeal, by special leave, against an order of a Commissioner of Assize of the Supreme Court of Ceylon, dated 18th March, 1954, whereby the appellant was sentenced to one month's rigorous imprisonment for having given false evidence during the course of a trial for a murder on 27th November, 1952, before the Commissioner who, in sentencing the appellant, purported to act under the summary powers vested in him by s. 440 (1) of the Criminal Procedure Code of Ceylon. By s. 440: "(1) If any person giving evidence on any subject in open court in any judicial proceeding under this code gives, in the opinion of the court before which the judicial proceeding is held, false evidence within the meaning of s. 188 of the Penal Code it shall be lawful for the court, if such court be the Supreme Court, summarily to sentence such witness as for a contempt of the court to imprisonment . . . for any period not exceeding three months . . . (4) In lieu of exercising the power given by this section the court may, if it thinks fit, transmit the record of the judicial proceeding to the Attorney-General to enable him to exercise the powers conferred on him by this code or proceed in manner provided by s. 380." The Commissioner, being apparently of the opinion, during the course of the murder trial, that evidence of the murder was being suppressed, on his own initiative called a number of witnesses and cross-examined them and the prosecution witnesses not in connection with the alleged murder, but in connection with the alleged suppression of evidence of that murder. In the course of that cross-examination he formed the opinion that the appellant, who was a village headman, and some of the police and other witnesses were committing perjury, and he proceeded to direct the acquittal of the prisoner, although he stated that he had not the slightest doubt that he was guilty and that he had with the assistance of the police and of the appellant suppressed the evidence. At a later hearing the Commissioner, after hearing counsel for the police and other witnesses and the appellant, in purported exercise of the summary power vested in him under s. 440 (1) of the code, sentenced them to varying terms of imprisonment. The appellant appealed.

LORD OAKSEY, giving the judgment, said that in their lordships' opinion the course taken by the Commissioner was misconceived. The summary power conferred by s. 440 (1) was one which should only be used when it was clear beyond doubt that a witness in the course of his evidence in the case being tried had committed perjury. It was, in their lordships' opinion, never intended that in the exercise of the power under s. 440 (1) in the course of a criminal trial a subsidiary criminal investigation should be set on foot not against the prisoner charged but against the witnesses in the case. If such an investigation was necessary it could and should be set on foot under s. 440 (4). Their lordships would therefore humbly advise Her Majesty that the appeal should be allowed and the order of the Commissioner of Assize, Supreme Court of Ceylon, set aside. In all the circumstances of the case, they thought it right to make the unusual order that the appellant should have his costs of the appeal and of the petition for special leave.

APPEARANCES: *Phineas Quass*, Q.C., and *R. K. Handoo* (*O. L. Blyth*); *Biden Ashbrooke* and *T. O. Kellock* (*T. L. Wilson & Co.*).

[Reported by CHARLES CLAYTON, Esq., Barrister-at-Law] **[1 W.L.R. 456**

Court of Appeal

LANDLORD AND TENANT: BUSINESS PREMISES: INTENTION TO DEMOLISH

Fisher *v.* Taylors Furnishing Stores, Ltd.

Denning, Morris and Parker, L.JJ. 20th March, 1956

Appeal from Brentwood County Court.

The Landlord and Tenant Act, 1954, provides by s. 30: "(1) The grounds on which a landlord may oppose an application [for a new tenancy under the Act] . . . are such of the following grounds as may be stated in the landlord's notice . . . that is to say: . . . (*f*) that on the termination of the current tenancy the landlord intends to demolish or reconstruct the premises comprised in the holding or a substantial part of those premises or to carry out substantial work of construction on the holding or part thereof and that he could not reasonably do so without obtaining possession of the holding; (*g*) subject as hereinafter provided, that on the termination of the current tenancy the landlord intends to occupy the holding for the purposes, or partly for the purposes, of a business to be carried on by him therein, or as his residence. (2) The landlord shall not be entitled to oppose an application on the ground specified in para. (*g*) of the last foregoing subsection if the interest of the landlord . . . was purchased or created after the beginning of the period of five years which ends with the termination of the current tenancy . . ." By s. 31: "(1) If the landlord opposes an application [for a new tenancy] . . . on grounds on which he is entitled to oppose it in accordance with the last foregoing section and establishes any of those grounds to the satisfaction of the court, the court shall not make an order for the grant of a new tenancy." The landlords of a retail shop, who had purchased the premises within the preceding five years, gave notice to the tenant determining his tenancy. On the tenant applying to the county court under the Landlord and Tenant Act, 1954, for the grant of a new lease the landlords opposed on the ground that on the termination of the tenancy they intended to demolish and reconstruct the premises and could not reasonably do so without obtaining possession. It was proved to the satisfaction of the judge that the landlords intended to demolish the whole of the premises; that they could not reasonably do so without obtaining possession, and that their object was not to occupy the old building but to rebuild on the site and to occupy the new building for the purposes of their business of furniture retailers. The judge, considering himself bound by *Atkinson* v. *Bettison* [1955] 1 W.L.R. 1127, granted a new lease. The landlords appealed.

DENNING, L.J., said that on the findings of the judge it would seem clear that the landlords had satisfied all the requirements of s. 30 (1) (*f*). The correct ground of the decision in *Atkinson* v. *Bettison*, *supra*, was that the proposed work was not "substantial"; the court gave an emphatic warning against allowing a landlord to escape too easily from the five years' rule; that was the full extent of the case, and it should not be taken to decide anything more. The court must be satisfied that the intention to reconstruct was genuine and not colourable; that it was a firm and settled intention, not likely to be changed; that the reconstruction was of a substantial part of the premises, indeed, so substantial that it could not be thought a device to get possession; that the work was so extensive that it was necessary to get possession in order to do it, and that it was to be done at once and not after a time. Nevertheless, it was going too far to say that the work of reconstruction must be the "primary" purpose; that word came from the judgment in *J. W. Smart* (*Modern Shoe Repairs*), *Ltd.* v. *Hinckley & Leicestershire Permanent Benefit Building Society* [1952] 2 T.L.R. 684, and was perfectly accurate in connection with that case, which dealt with the temporary provisions of the Act of 1951, but the Act of 1954 contained permanent provisions to which different considerations applied. In many cases the landlord would have two genuine intentions, to get possession both for his own business and for reconstruction. He did not lose the benefit of s. 30 (1) (*f*) simply because he had bought less than five years before. If he intended to let the reconstructed premises to a new tenant he could clearly rely on the subsection, and should not be debarred from doing so merely because he intended to occupy them himself. The position was made clear by s. 31 (1); if the landlord established *any* of the grounds of s. 30 (1) he was entitled to possession. The appeal should be allowed.

MORRIS and PARKER, L.JJ., agreed. Appeal allowed.

APPEARANCES: *H. V. Lloyd-Jones*, Q.C., and *J. W. Miskin* (*Bird & Bird*, for *H. J. Jefferies & Co.*, Southend); *J. Stirling*, Q.C., and *Lord Vaughan* (*Torr & Co.*, for *Stamp, Wortley & Co.*, Brentwood).

[Reported by F. R. DYMOND, Esq., Barrister-at-Law] **[2 W.L.R. 985**

MEASURE OF DAMAGES: PROPERTY PURCHASED ON NEGLIGENT REPORT BY SURVEYOR

Philips *v.* Ward

Denning, Morris and Romer, L.JJ. 21st March, 1956

Appeal from Official Referee.

In June, 1952, the plaintiff, in reliance on a negligent and inaccurate report by the defendant surveyor, purchased for £25,000 a property the market value of which in its actual condition was found by the official referee to be £21,000; but after moving in, the plaintiff found that it would require an additional expenditure of £7,000 at 1952 prices to put the property into the condition in which it had been described in the report. In an action for damages for negligence against the surveyor, the plaintiff claimed, *inter alia*, the cost of repair at prices ruling at the date of the hearing. But the official referee awarded him £4,000, namely, the difference between the value of the property as it should have been described and its value as described, viz., £25,000. The plaintiff appealed.

DENNING, L.J., said that it was clear law that the proper measure of damage was the amount of money which would put the plaintiff into as good a position as if the surveying contract had been properly fulfilled. The proper measure of damages was therefore the difference between the value in its assumed good condition and the value in the bad condition which should have been reported to the client. The case was different from those in which a house was damaged or destroyed by the fault of a tortfeasor; or those where a house was left out of repair by a tenant in breach of his covenant. But if those cases were relevant, they went to show that the cost of repair was not nowadays the proper measure. As he (his lordship) had said in *Morris* v. *Sands* (unreported (1955), 15th July), the cost of repair was not the proper test in the case of a considerable estate, for a purchaser could turn the want of repair to his advantage in that, when he put it into repair, he could get considerable tax relief. If the plaintiff in the present case were to recover from the surveyor the sum of £7,000, it would mean that he would get for £18,000 a house and land which were worth £21,000. That could not be right. The proper amount for him to recover was £4,000. As to the time at which the damages should be assessed, his lordship thought it right to assess the damages as at 1952 prices. The general principle of English law was that damages must be assessed as at the date when the damage occurred. A fall thereafter in the value of money did not in law affect the figure, for the simple reason that sterling was taken to be constant in value. He would dismiss the appeal.

MORRIS, L.J., agreeing, said that it was to be remembered that property in which there was extensive new work might have an increased life and might acquire an enhanced value, and the annual cost of upkeep of the property would also be diminished. The plaintiff must not be placed in a better position by the award of damages than he would have been in had the surveyor given a proper report.

ROMER, L.J., also concurring, saw no warrant for the plaintiff's submission that the sum should be increased to reflect the diminution in the value of the pound since 1952. Appeal dismissed.

APPEARANCES: *Leonard Lewis* (*B. A. Woolf & Co.*); *Lord Hailsham*, Q.C., and *Owen Stable* (*Oswald Hickson, Collier & Co.*).

[Reported by Miss M. M. HILL, Barrister-at-Law] [1 W.L.R. 471

EASEMENT: DEDICATION OF RIGHT OF WAY OVER ACCOMMODATION BRIDGE: STATUTORY PURPOSES OF RAILWAY AUTHORITY

British Transport Commission *v.* Westmorland County Council
Same *v.* Worcestershire County Council

Singleton, Jenkins and Hodson, L.JJ. 22nd March, 1956

Appeal from the Divisional Court ([1956] 2 W.L.R. 428; *ante*, p. 112).

A footpath across a bridge spanning a railway line constructed in 1847 under powers conferred by the Kendal and Windermere Railway Act, 1845, was marked on a provisional map prepared by a county council pursuant to the National Parks and Access to the Countryside Act, 1949, as a public right of way as at 1st November, 1952. The British Transport Commission, the railway owners, applied to quarter sessions under s. 31 of the Act for a declaration that no right of way existed over the bridge. Quarter sessions found that the bridge had been constructed solely as a private accommodation bridge for the benefit of the owners and occupiers of the lands on either side of the railway line and severed thereby, and that it had never been expressly dedicated to the public, but that its use by the public over a period of more than twenty years had been such as to raise a presumption that it had been dedicated. They found that the continued existence of the bridge would not endanger the running of the trains nor the operation of the railway, and held that the footpath had been dedicated. On appeal, the Divisional Court upheld the decision of quarter sessions. The Commission appealed.

SINGLETON, L.J., said that the substantial contention of the Commission was that the dedication of a footpath over the bridge in question would deprive them of their statutory powers under s. 16 of the Railway Clauses Consolidation Act, 1845, to discontinue the bridge and crossing, and that they could not in law deprive themselves of such a statutory power. There were a number of authorities, the effect of which had been correctly expressed in the Divisional Court in the words: "None of the cases suggests that the creation of an easement is *ultra vires* so long as it is not inconsistent with the statutory powers for which the company was incorporated." That statement was consistent with the views expressed in *R.* v. *Leake* (1833), 5 B. & Ad. 469, and *Birkdale District Electric Supply Co., Ltd.* v. *Corporation of Southport* [1926] A.C. 355, in which Lord Sumner, in discussing *Ayr Harbour Trustees* v. *Oswald* (1883), 8 App. Cas. 623, which was distinguishable, used the expression "held to have renounced a part of their statutory birthright" which had been often used since. In the present case the public had used the bridge for over 100 years without any inconvenience to the railway company or their workers; the possible loss of the right to terminate something at some time was not a parting with a statutory birthright. Among a number of other cases the nearest to the present was *South Eastern Railway Co.* v. *Warr* (1923), 21 L.G.R. 669, where it was held that the dedication of a footway across a level crossing was not inconsistent with the objects and obligations of the company. In that case it was said that there must be disclosed by evidence something which showed that the company could not dedicate because to do so would interfere with its statutory powers. In the present case there was no such evidence. The law as declared in the cases was recognised in the Rights of Way Act, 1932, which recognised the possible incapacity of a statutory body to dedicate its lands. It could not be said in the present case that the railway authorities were depriving themselves of their statutory birthright, or that the user by the public was incompatible with their statutory duties. The appeal should be dismissed.

JENKINS and HODSON, L.JJ., agreed. Appeal dismissed.

[NOTE: The second appeal was also dismissed, the facts being indistinguishable, without formal judgments being delivered.]

APPEARANCES: Sir *F. Soskice*, Q.C., and *J. P. Widgery* (*M. H. B. Gilmour*); *Harold Williams*, Q.C., and *E. S. Temple* (*Sharpe, Pritchard & Co.*, for *K. S. Himsworth*, Kendal, and *W. R. Scurfield*, Worcester).

[Reported by F. R. DYMOND, Esq., Barrister-at-Law] [2 W.L.R. 1022

BAILMENT: LONDON LIGHTERAGE CLAUSE EXEMPTING BAILEE FROM LIABILITY FOR NEGLIGENCE

J. Spurling, Ltd. *v.* Bradshaw

Denning, Morris and Parker, L.JJ. 26th March, 1956

Appeal from the Mayor's and City of London Court.

The defendant, a wholesale factor, who had had previous business dealings with the plaintiff warehousemen, delivered to them eight barrels of orange juice for storage, and a few days later received a "landing account" which on its face referred to conditions printed in small type on the back. These included the London lighterage clause, which exempted the plaintiffs, *inter alia*, from liability for any loss, damage or detention in respect of goods entrusted to them in the course of their business, occasioned by the negligence, wrongful act or default of themselves, their servants or agents. The barrels, when collected, were found to be either empty or in such damaged condition as to be useless. In an action by the warehousemen to recover charges due for storage, the defendant counter-claimed for damages

for alleged breach of an implied term of the contract of bailment to take reasonable care of the barrels. The plaintiffs denied negligence and relied on the exemption clause. The county court judge, after hearing evidence for the defendant only, found that the plaintiffs had been negligent; but he dismissed the counter-claim, holding that the exemption clause applied. The defendant appealed.

DENNING, L.J., said that it was not open to the judge to find that the warehousemen had been negligent when they had not given their evidence. But, assuming that they were negligent, the question was whether the clause excused them from liability. These exempting clauses were nowadays all held to be subject to the overriding proviso that they only availed to exempt a party when he was carrying out his contract and not when he deviated from it or was guilty of a breach which went to the root of it. Moreover, where there was an exempting clause, the burden in the ordinary way was on the bailee to bring himself within the exception. But here the defendant complained of negligence ond nothing more. The clause, therefore, availed to exempt the warehousemen, provided that it was part of the contract, in that the warehousemen had done what was reasonably sufficient to give notice of the conditions. His lordship agreed with counsel for the defandant that the more unreasonable a clause was, the greater the notice which must be given of it. But in the present case the judge was entitled to find that sufficient notice was given, and, by the course of business and conduct of the parties, these conditions were part of the contract. The warehousemen were entitled to rely on the exempting condition, and the appeal should be dismissed.

MORRIS, L.J., concurring, said that there was no material before the court for finding that the claim resulted from some act of the warehousemen outside what they had contracted to do.

PARKER, L.J., also agreeing, said that he had seldom seen a wider clause, and it was impossible to think of any circumstances in which the loss occurred which were not covered, provided that there had been no breach of a fundamental term akin to deviation. But here the only complaints which could be made were those alleged, and the judge, having found that the negligence alleged was proved, was right in saying that the exemption clause applied. This case was quite different from *Woolmer* v. *Delmer Price, Ltd.* [1955] 1 Q.B. 291, and it was not necessary to say whether that case had been wrongly decided. Appeal dismissed.

APPEARANCES: *Jonathan Sofer* (*Shindler & Co.*); *John Megaw*, Q.C., and *C. F. Dehn* (*Hyde, Mahon & Pascall*).

[Reported by Miss M. M. HILL, Barrister-at-Law] **[1 W.L.R. 461**

RATING: STATUTORY WATER UNDERTAKING: PROFITS BASIS: SUMS RAISED BY PRECEPTS TO MEET LOAN CHARGES

Lee (Valuation Officer) *v.* Mid-Northamptonshire Water Board

Denning, Morris and Parker, L.JJ. 27th March, 1956

Appeal from the Lands Tribunal.

A statutory water board, operating in the areas of a number of local authorities, and assessed for rating purposes on the "profits" basis, derived their revenue partly from water charges on consumers and partly from precepts levied on the local authorities. Under the terms of their private Act, they had to make estimates of their revenue and expenditure for the forthcoming year, but could not allocate any particular part of revenue for any particular purpose, as all receipts had to be carried to a common fund out of which all expenses had to be defrayed. In January, 1951, the board estimated that in the forthcoming financial year —1st April, 1951, to 31st March, 1952—they would have to find some £9,615 loan charges on uncompleted works not yet in beneficial occupation, and they included that sum in the precepted total of £66,170 levied in respect of that year to meet anticipated deficiencies in revenue. In proceedings before the Lands Tribunal to establish, *inter alia*, the cumulo net annual value of the undertaking for rating purposes, it was contended for the board that the sum of £9,615 should not be included in the gross receipts as it was not revenue potentially available to the hypothetical tenant, having been raised to meet the landlord's charges on works not yet occupied beneficially. The tribunal accepted that contention, and excluded that sum from their calculation of the cumulo. The valuation officer appealed.

DENNING, L.J., delivering the judgment of the court, said that the tribunal's decision was based on *Manchester Corporation* v. *Bolton Area Assessment Committee* (1931), 144 L.T. 571; 47 T.L.R. 210. It was wrong to bring into the profits basis any estimates prepared for the purpose of calculating the amount of the precepts, as the money, when received, was not earmarked for any particular purpose. Even if the £9,615 could be earmarked for interest charges, it ought not to be deducted from the gross precept revenue in arriving at the cumulo. The gross revenue ought to be taken without any deduction for interest charges. The profits basis had long been used for calculating the assessments of water undertakings, the revenue being taken as the total revenue from rents and rates without deduction for interest charges, but in *Metropolitan Water Board* v. *St. Marylebone Assessment Committee* [1923] 2 Q.B. 86, the Divisional Court held that certain sums received from precepts should be excluded because they were to meet interest charges which were payments falling on a landlord and not on a tenant. But that case could not stand with the reasoning in *St. James' and Pall Mall Electric Light Co., Ltd.* v. *Westminster Assessment Committee* [1934] A.C. 33. The hypothetical landlord who built a waterworks would expect to receive enough rent to pay the interest on borrowed money and to put something aside for a sinking fund. Although the question was what the hypothetical tenant could pay, in such cases the tenant had the power to raise the additional revenue required to enable him to pay the rent which the landlord would expect to receive. Interest and sinking fund charges were landlord's charges, but that was irrelevant, the hypothetical tenant would not take them into his calculations; the whole question was, what were his receipts? The particular application of the receipts when once ascertained was immaterial. In the *Manchester* case, *supra*, the question was whether a sum payable as interest on an uncompleted pipe-line and reservoir should be included as part of the revenue of the hypothetical tenant, and the Divisional Court, following the *Marylebone* case, *supra*, held that it should not. That decision was also wrong. The point in issue in that case and the present case was decided the other way by the Court of Session in *Aberdeen Magistrates* v. *Assessor for Aberdeen* [1927] S.C. 458, a decision which was right and should be followed. The *Marylebone* and *Manchester* cases should be overruled, and the appeal allowed. Appeal allowed. Leave to appeal.

APPEARANCES: *Cyril Harvey*, Q.C., and *Patrick Browne* (*Solicitor of Inland Revenue*); *Harold Williams*, Q.C., and *W. L. Roots* (*Sherwood & Co.*, for *C. E. Vivian Rowe*, Northampton).

[Reported by F. R. DYMOND, Esq., Barrister-at-Law] **[2 W.L.R. 1012**

Chancery Division

INCOME TAX: TRAVEL EXPENSES: HUSBAND AND WIFE COMPANY: VISIT TO AUSTRALIA TO STUDY REFRIGERATION METHODS

Maclean' (Inspector of Taxes) *v.* Trembath

Roxburgh, J. 16th March, 1956

Case stated by the Commissioners for the Special Purposes of the Income Tax Acts.

A taxpayer and his wife were the sole directors of, and owned all the shares in, a private limited company which dealt in refrigerators and refrigeration equipment. The taxpayer worked full time in the company's business, but the wife, who was also the secretary of the company, did not attend the company's business premises in the year of assessment, and any documents requiring her signature were signed at home. The company had at all material times been an authorised dealer in the products of the Frigidaire Division of General Motors, Ltd., a company associated with General Motors Corporation, a company incorporated in the U.S.A. under agreements between the company and "Frigidaire," by which the company was appointed sole authorised dealer in commercial and domestic products for the major part of South London and Surrey. The taxpayer and his wife went to Australia to study refrigeration methods there. The taxpayer had discussed this visit with "Frigidaire" officials, who arranged for him to visit General Motors installations and offices in Melbourne, Sydney and Brisbane. The case stated showed that the taxpayer undertook engagements relating to the company's business throughout the tour, but that the wife accompanied him only on some four occasions. There was no resolution

of the company providing that she should go to Australia on the company's business, but merely a statement by the taxpayer that he thought she should go with him. The Special Commissioners found as a fact that the expenses of the taxpayer and his wife incurred in travelling to Australia were "wholly, exclusively and necessarily" in the performance of their office as directors within para. 7 of Sched. IX to the Income Tax Act, 1952. On appeal by the Crown from that decision, it was contended on behalf of the Crown that the expenses were incurred by the taxpayer in acquiring "personal equipment" in respect of his business as a dealer in refrigerators.

ROXBURGH, J., said that it was argued that the taxpayer went to improve his "personal equipment." That might have been a possible finding, but he thought it unlikely. The real question was whether he did not go primarily for personal reasons. There was evidence before the Commissioners pointing in more than one direction, and, having heard him examined and cross-examined, they made a finding of fact which was open to them on the evidence. He could not interfere, and their finding stood. But he could not take the same view with regard to the wife. It was a fallacy to suppose that, if the husband's expenses were allowable, the wife's were necessarily allowable too. Unlike the taxpayer, she did not attend and submit herself for cross-examination and he doubted if he would have done what he was going to do had she given evidence accepted by the commissioners after cross-examination. Even so, he might have hesitated to reverse this finding if any sort of explanation had been given as to what she was supposed to be doing in Australia on behalf of the company, but there was not a word about that. The fact that she visited some three or four places and took part in some discussions seemed to him to be altogether too vague to give him any real assistance. The finding of the Commissioners was wrong in so far as it was said that the expenditure on her behalf was expended wholly and exclusively in the performance of the duties of her office; that was quite an impossible finding on the evidence. That did not mean that the expenditure might not have been necessarily incurred in the performance of the duties of her office. But being satisfied that there was no evidence that her expenditure was incurred wholly and exclusively in the performance of her duties as a director, he did not feel much embarrassed by the circumstance that they also found that it was "necessarily" incurred. If there had been in the minute book a resolution of the board of directors requesting her to go to Australia for some specified purpose, then he would have been prepared to say that this expenditure ought to have been allowed, unless the Crown were able to show that the resolution was not passed in good faith. That there was a business element in her visit he was prepared to concede; but it was ill defined and fell far short of showing that this expenditure was in the performance of the duties of her office of director. He must, therefore, reverse the finding of the Commissioners in regard to the expenditure on behalf of the wife, and he would allow the appeal in part, that was so far as it related to one moiety of the sum in question, the expenditure on behalf of the wife, and reject it *qua* the other. Appeal allowed in part.

APPEARANCES: *Frank Heyworth Talbot*, Q.C., *Sir Reginald Hills* and *Montagu Temple* (*Solicitor of Inland Revenue*); *P. J. Brennan* (*Tuck & Mann*).

[Reported by Mrs. IRENE G. R. MOSES, Barrister-at-Law] [1 W.L.R. 437

SOLICITOR: NEGLIGENCE: SOLICITOR ACTING FOR BOTH PARTIES ON SALE OF HOUSE PARTLY LET: DUTY TO MAKE NQUIRY REGARDING STANDARD OR RECOVERABLE RENT OF PARTS LET

Goody *v.* Baring

Danckwerts, J. 22nd March, 1956

Action.

On a sale and purchase of leasehold property of which the first and second floors were each subject to a tenancy at 25s. a week, a solicitor, at the purchaser's suggestion, acted for both parties. He used a printed form of "Inquiries before contract," containing, *inter alia*, a request for full particulars of all subsisting tenancies. It did not contain any questions about standard or recoverable rents. In an interview with the vendor the solicitor noted the answers: "Top floor let to [name] 25s. per week inclusive. This was the rent receivable when the vendor bought in 1948 and no increases have been passed on to tenant. First floor let to [name] 25s. per week ditto. Ground floor let to vendor from 1947 to 1948 at 35s. per week inclusive. No information of previous lettings." He did not ask the vendor about the standard or the recoverable rents. He prepared in duplicate a contract which stated that the property was sold with vacant possession of the ground floor and garden but subject to tenancies of the first and second floors at 25s. each. The purchaser called at the solicitor's office to sign his part and the solicitor went through the inquiries with him and told him that he could possibly increase the rents as there had been no increase since 1950 although the rates had gone up. Some time after completion a proposed increase in the rents was refused on behalf of one of the tenants by solicitors who had quite easily ascertained that in 1939 both floors were let for a total rent of 30s. a week and that the rates for the whole house had been increased by only 10s. a week. In proceedings by both tenants the county court fixed the standard rent for each of the two floors at 15s. and, with the permitted increases, the recoverable rents at 17s. 6d. and 18s. 4d. a week, so that the purchaser had to refund to the tenants the excess payments which they had made to him. In an action against the solicitor for damages for breach of his duty as solicitor to the purchaser, the purchaser alleged that the defendant had not ascertained or sufficiently tried to ascertain what the recoverable rents were and had not advised the purchaser that the rents being received might be more than the recoverable rents.

DANCKWERTS, J., said that in *Moody* v. *Cox & Matt* [1917] 2 Ch. 71, Scrutton, L.J., uttered words of warning regarding the dangerous practice of a solicitor acting for both vendor and purchaser. It seemed that even now they had not been properly appreciated, or perhaps even read, by many. The liability of a solicitor for negligence had recently been described by Harman, J., as quoted in *Simmons* v. *Pennington & Son* [1955] 1 W.L.R. 183, at p. 245, as being the same as that of anyone else; the question was, having regard to the degree of skill held out to the public by solicitors, did the conduct of the solicitor fall short of such standard? The standard required of a solicitor acting for both parties was the same as that of a solicitor acting for the purchaser alone. In the present case there were two tenants in occupation, and the rateable value of the property was such that it was likely to be subject to the Rent Acts. In those circumstances it was important to ascertain the amount of the standard rent, and to give advice to the client accordingly. That question had not been put to the vendor; the form "Inquiries before contract" was curiously defective in that respect. The defendant had been content with meagre answers from the vendor; a solicitor who knew his duty and was not hampered by acting for both parties should have inquired further. He should have asked the tenants what rents they were paying, and inquired whether such rents were the standard or recoverable rents. The promptness of the tenants' reaction to the attempt to raise their rents suggested that the necessary information could easily have been obtained. The defendant had failed in his duty, and it was no excuse that enquiries might be troublesome to make. The defendant and two other solicitors had given evidence as to the usual practice of solicitors, and it had been argued that a judge was bound to accept such evidence as showing the proper practice, and could not draw on his own conveyancing experience or reach conclusions from cases such as *Hunt* v. *Luck* [1902] 1 Ch. 428. That could not be accepted; even if it were, the defendant fell below the standards mentioned by the other witnesses. It had also been suggested that when preliminary inquiries before contract had been made, there was no obligation on the purchaser's solicitor after contract signed to make requisitions and searches. That was not correct; the solicitor must still make such requisitions and inquiries, even if the preliminary inquiries had been so complete that it was only necessary to ask whether the former answers were still complete and accurate. Judgment for the plaintiff.

APPEARANCES: *C. P. Harvey*, Q.C., and *J. P. Brookes* (*Chandler & Creeke*); *Patrick O'Connor* (*Hewitt, Woollacott & Chown*).

[Reported by F. R. DYMOND, Esq., Barrister-at-Law] [1 W.L.R. 448

BANKRUPTCY: SET OFF: DEBT OWING TO DEBTOR BY BANKRUPT: DEBTOR'S OVERDRAFT GUARANTEED BY BANKRUPT: DISCHARGE OF OVERDRAFT BY TRUSTEE

***In re* a Debtor (No. 66 of 1955); *ex parte* the Debtor *v.* Trustee of Property of Waite (a Bankrupt)**

Harman and Danckwerts, JJ. 26th March, 1956

Appeal from Brighton County Court.

The Bankruptcy Act, 1914, provides, by s. 31: "Where there have been mutual credits, mutual debts or other mutual dealings, between a debtor against whom a receiving order shall

be made under this Act and any other person proving or claiming to prove a debt under the receiving order, an account shall be taken of what is due from the one party to the other in respect of such mutual dealings, and the sum due from the one party shall be set off against any sum due from the other party, and the balance of the account, and no more, shall be claimed or paid on either side respectively . . ." In January, 1952, the debtor agreed to sell goods to *W* on credit for which the debtor had to pay in cash. In order to pay for the goods the debtor found it necessary to borrow the requisite money from his bank, and *W*, in consideration of the credit which he thus received, agreed to guarantee the debtor's overdraft to an extent not exceeding £200, the guarantee being secured by a deposit of title deeds of certain property owned by *W*. During 1952 the debtor supplied goods to *W* to the value of £201 14s. 6d. and *W* paid £100 into the debtor's bank, which left a balance due of £101 14s. 6d. On 1st October, 1954, a receiving order was made against *W*, and *W's* trustee in bankruptcy, in the course of realising the assets and in order to complete a sale by him of the property secured by the deposit of title deeds, paid to the debtor's bank the sum of £133 14s., the amount of the debtor's overdraft, and obtained the release of the deeds. On 9th September, 1955, *W's* trustee commenced an action in the Brighton District Registry against the debtor to recover the sum of £133 14s. "paid for the defendant as his surety." The debtor appeared and claimed to set off the sum of £101 14s. 6d. for the goods supplied to *W* and interest on the overdraft, but on 6th October, 1955, the district registrar gave leave to *W's* trustee to sign judgment for the sum of £133 14s. and £16 16s. costs, a total of £150 10s. On 15th October, 1955, *W's* trustee in bankruptcy obtained the issue of a bankruptcy notice to the debtor in which was claimed payment of the sum of £150 10s. This bankruptcy notice was not complied with and on 22nd December, 1955, *W's* trustee filed a petition in bankruptcy against the debtor based on the said judgment debt. On 2nd February, 1956, the registrar (who was the same person as the registrar of the Brighton District Registry) was asked on behalf of the debtor to go behind his decision as district registrar in his judgment of 6th October, 1955, and allow the set off claimed by the debtor. On 6th February, 1956, the registrar, in a judgment, refused to go behind his previous judgment. On 9th February, 1956, a receiving order was made against the debtor. The debtor appealed.

DANCKWERTS, J., delivering the judgment of the court, said that the registrar's decision not to go behind his previous judgment was based on the view that the proper way to test it was by appeal. This was wrong, as even if the debtor had appealed and lost, it would still have been open to the bankruptcy court to go behind the judgment and re-open the matter: see *In re Fraser* [1892] 2 Q.B. 633. The first question was whether the debtor was able to rely on the set-off provisions of s. 31 in *W's* bankruptcy. At the date of the receiving order he had the right to prove for the debt due from *W*; it was much later that *W's* trustee paid off the debtor's overdraft. Thus, while there had been mutual dealings, there were at the date of the receiving order no mutual debts to be set off. The debtor had relied on *In re Daintrey* [1900] 1 Q.B. 546 and other cases, which were distinguishable. But in *Kitchen's Trustees* v. *Madders* [1950] Ch. 134 rent accrued due to a trustee after the date of the bankruptcy was not allowed to be set off. The debtor's claim was contrary to the observations in *In re Fenton* [1931] 1 Ch. 85, where it was said that until a surety was called on to pay and did pay under his guarantee there was no debt or right at law, but only a right to come into equity to get an indemnity against his liability. Accordingly, at the date of *W's* bankruptcy there was no debt due to *W* against which could be set off *W's* debt to the debtor for goods supplied. It followed that the decision in the action by the trustee against the debtor was right; there was no mutuality at the date of the receiving order, and the debt on which the action was founded was due not to *W* but to the trustee. It followed that the judgment was good and a proper foundation for a bankruptcy notice: see *In re a Bankruptcy Notice* (*No.* 171 *of* 1934) [1934] Ch. 431. The court was not bound to make a receiving order, as s. 5 (2) and (3) made the jurisdiction discretionary, but, taking all the circumstances into account, an order ought not to be refused in the present case. Appeal dismissed. Leave to appeal.

APPEARANCES: *Muir Hunter* (*Nye & Donne*, Brighton); *J. K. Wood* (*Haslewood, Hare, Shirley Woolmer & Co.*, for *Bosley & Co.*, Brighton).

[Reported by F. R. DYMOND, Esq., Barrister-at-Law] **[1 W.L.R. 480**

WILL: ELECTION: BEQUEST OF PROPERTY OF THIRD PARTIES: PART OWNER BENEFITING UNDER WILL

***In re* Dicey, deceased; Julian *v.* Dicey**

Danckwerts, J. 27th March, 1956

Adjourned summons.

A testatrix by cl. 4 of her will, made in 1950, devised to the plaintiff, her grandson, "my two freehold houses in Beresford Road, Walthamstow . . ." By cl. 5 she bequeathed to the defendant, her son, another freehold house, and also her real and personal residuary estate. The testatrix had no disposable interest in the two freehold houses in Beresford Road, which she merely occupied as a life tenant under a deed of family arrangement made in 1939, by which the defendant became on her death entitled to a half share of the beneficial interest in the houses, and the plaintiff and his brother to a quarter share each. The plaintiff claimed that the defendant must elect either in favour of the will and give effect to the devise to him (the plaintiff) so far as he could, or against the will, and compensate the plaintiff to the extent of his (the defendant's) interest under the will in respect of the plaintiff not receiving the defendant's share of the two houses. The defendant contended that the doctrine of election did not apply, on the ground, *inter alia*, that he himself could not give effect to the devise, since a quarter share belonged to the plaintiff's brother.

DANCKWERTS, J., said that the question of election could, at the most, only apply to the extent of a half share in the houses to which beneficially the defendant was entitled. The defendant contended that he was not put to any election at all. First, because there was no effective devise whatever of the two houses, apart from the fact that the testatrix did not own any devisable interest, as there was nothing to identify the houses. But when one knew the history of the matter, and found that the testatrix had occupied the houses, it was obvious that by the words "my two freehold houses in Beresford Road, Walthamstow," she meant those which she occupied as tenant for life. It had been argued that the defendant could not give effect to the bequest or devise in question, because he did not own the two freehold houses absolutely. It was an argument which had some force but it could not prevail in face of two cases he would mention. The first was *In re Booth* [1906] 2 Ch. 321, where the doctrine of election was very well stated by Swinfen Eady, J. (at p. 325), quoting Sir George Jessel in *Rogers* v. *Jones* (1876), 3 Ch. D. 688. The matter became even clearer on looking at *In re Ogilvie* [1918] 1 Ch. 492; the situation in that case and the observations of Younger, J., were quite inconsistent with the argument put forward by counsel, and he must therefore come to the conclusion that the question of election applied in the present case. To the extent of his half interest in the property of which the testatrix had attempted to dispose, the defendant was put to his election whether to give effect, in so far as he could, to the whole of the terms of the will of the testatrix. He might decide to elect in favour of the will (or approbate, as Scottish lawyers put it) and he would then have to give up the whole of his share in the properties in question. On the other hand, if he decided to reprobate, or elect against the will, he was under an obligation to compensate to a maximum which was limited on the one hand by the value of a half interest in the two properties in question and, on the other hand, by the total value of the interest which he took under the provision of the will of the testatrix. He had not yet elected, but it seemed to him that the defendant was bound within a reasonable time to decide one way or the other. Declaration accordingly.

APPEARANCES: *S. C. Silkin* (*Montlake & Co.*); *J. Hamawi Hames* (*Craigen, Wilders & Sorrell*).

[Reported by Mrs. IRENE G. R. MOSES, Barrister-at-Law] **[2 W.L.R. 996**

Queen's Bench Division

EVIDENCE: APPLICATION BY PLAINTIFF ON MEDICAL GROUNDS TO GIVE EVIDENCE BEFORE EXAMINER OUT OF COURT

Donn and Another *v.* Feinstein and Another

Slade, J. 5th March, 1956

Appeal to judge in chambers.

By their statement of claim the plaintiffs, Hyman Donn and his wife, Eve Donn, alleged that they had each been slandered by both of the defendants, Michael Feinstein and his wife, Marie

of the company providing that she should go to Australia on the company's business, but merely a statement by the taxpayer that he thought she should go with him. The Special Commissioners found as a fact that the expenses of the taxpayer and his wife incurred in travelling to Australia were "wholly, exclusively and necessarily" in the performance of their office as directors within para. 7 of Sched. IX to the Income Tax Act, 1952. On appeal by the Crown from that decision, it was contended on behalf of the Crown that the expenses were incurred by the taxpayer in acquiring "personal equipment" in respect of his business as a dealer in refrigerators.

ROXBURGH, J., said that it was argued that the taxpayer went to improve his "personal equipment." That might have been a possible finding, but he thought it unlikely. The real question was whether he did not go primarily for personal reasons. There was evidence before the Commissioners pointing in more than one direction, and, having heard him examined and cross-examined, they made a finding of fact which was open to them on the evidence. He could not interfere, and their finding stood. But he could not take the same view with regard to the wife. It was a fallacy to suppose that, if the husband's expenses were allowable, the wife's were necessarily allowable too. Unlike the taxpayer, she did not attend and submit herself for cross-examination and he doubted if he would have done what he was going to do had she given evidence accepted by the commissioners after cross-examination. Even so, he might have hesitated to reverse this finding if any sort of explanation had been given as to what she was supposed to be doing in Australia on behalf of the company, but there was not a word about that. The fact that she visited some three or four places and took part in some discussions seemed to him to be altogether too vague to give him any real assistance. The finding of the Commissioners was wrong in so far as it was said that the expenditure on her behalf was expended wholly and exclusively in the performance of the duties of her office; that was quite an impossible finding on the evidence. That did not mean that the expenditure might not have been necessarily incurred in the performance of the duties of her office. But being satisfied that there was no evidence that her expenditure was incurred wholly and exclusively in the performance of her duties as a director, he did not feel much embarrassed by the circumstance that they also found that it was "necessarily" incurred. If there had been in the minute book a resolution of the board of directors requesting her to go to Australia for some specified purpose, then he would have been prepared to say that this expenditure ought to have been allowed, unless the Crown were able to show that the resolution was not passed in good faith. That there was a business element in her visit he was prepared to concede; but it was ill defined and fell far short of showing that this expenditure was in the performance of the duties of her office of director. He must, therefore, reverse the finding of the Commissioners in regard to the expenditure on behalf of the wife, and he would allow the appeal in part, that was so far as it related to one moiety of the sum in question, the expenditure on behalf of the wife, and reject it *qua* the other. Appeal allowed in part.

APPEARANCES: *Frank Heyworth Talbot*, Q.C., *Sir Reginald Hills* and *Montagu Temple* (*Solicitor of Inland Revenue*); *P. J. Brennan* (*Tuck & Mann*).

[Reported by Mrs. IRENE G. R. MOSES, Barrister-at-Law] [1 W.L.R. 437

SOLICITOR: NEGLIGENCE: SOLICITOR ACTING FOR BOTH PARTIES ON SALE OF HOUSE PARTLY LET: DUTY TO MAKE INQUIRY REGARDING STANDARD OR RECOVERABLE RENT OF PARTS LET

Goody *v.* Baring

Danckwerts, J. 22nd March, 1956

Action.

On a sale and purchase of leasehold property of which the first and second floors were each subject to a tenancy at 25s. a week, a solicitor, at the purchaser's suggestion, acted for both parties. He used a printed form of "Inquiries before contract," containing, *inter alia*, a request for full particulars of all subsisting tenancies. It did not contain any questions about standard or recoverable rents. In an interview with the vendor the solicitor noted the answers: "Top floor let to [name] 25s. per week inclusive. This was the rent receivable when the vendor bought in 1948 and no increases have been passed on to tenant. First floor let to [name] 25s. per week ditto. Ground floor let to vendor from 1947 to 1948 at 35s. per week inclusive. No information of previous lettings." He did not ask the vendor about the standard or the recoverable rents. He prepared in duplicate a contract which stated that the property was sold with vacant possession of the ground floor and garden but subject to tenancies of the first and second floors at 25s. each. The purchaser called at the solicitor's office to sign his part and the solicitor went through the inquiries with him and told him that he could possibly increase the rents as there had been no increase since 1950 although the rates had gone up. Some time after completion a proposed increase in the rents was refused on behalf of one of the tenants by solicitors who had quite easily ascertained that in 1939 both floors were let for a total rent of 30s. a week and that the rates for the whole house had been increased by only 10s. a week. In proceedings by both tenants the county court fixed the standard rent for each of the two floors at 15s. and, with the permitted increases, the recoverable rents at 17s. 6d. and 18s. 4d. a week, so that the purchaser had to refund to the tenants the excess payments which they had made to him. In an action against the solicitor for damages for breach of his duty as solicitor to the purchaser, the purchaser alleged that the defendant had not ascertained or sufficiently tried to ascertain what the recoverable rents were and had not advised the purchaser that the rents being received might be more than the recoverable rents.

DANCKWERTS, J., said that in *Moody* v. *Cox & Matt* [1917] 2 Ch. 71, Scrutton, L.J., uttered words of warning regarding the dangerous practice of a solicitor acting for both vendor and purchaser. It seemed that even now they had not been properly appreciated, or perhaps even read, by many. The liability of a solicitor for negligence had recently been described by Harman, J., as quoted in *Simmons* v. *Pennington & Son* [1955] 1 W.L.R. 183, at p. 245, as being the same as that of anyone else; the question was, having regard to the degree of skill held out to the public by solicitors, did the conduct of the solicitor fall short of such standard? The standard required of a solicitor acting for both parties was the same as that of a solicitor acting for the purchaser alone. In the present case there were two tenants in occupation, and the rateable value of the property was such that it was likely to be subject to the Rent Acts. In those circumstances it was important to ascertain the amount of the standard rent, and to give advice to the client accordingly. That question had not been put to the vendor; the form "Inquiries before contract" was curiously defective in that respect. The defendant had been content with meagre answers from the vendor; a solicitor who knew his duty and was not hampered by acting for both parties should have inquired further. He should have asked the tenants what rents they were paying, and inquired whether such rents were the standard or recoverable rents. The promptness of the tenants' reaction to the attempt to raise their rents suggested that the necessary information could easily have been obtained. The defendant had failed in his duty, and it was no excuse that enquiries might be troublesome to make. The defendant and two other solicitors had given evidence as to the usual practice of solicitors, and it had been argued that a judge was bound to accept such evidence as showing the proper practice, and could not draw on his own conveyancing experience or reach conclusions from cases such as *Hunt* v. *Luck* [1902] 1 Ch. 428. That could not be accepted; even if it were, the defendant fell below the standards mentioned by the other witnesses. It had also been suggested that when preliminary inquiries before contract had been made, there was no obligation on the purchaser's solicitor after contract signed to make requisitions and searches. That was not correct; the solicitor must still make such requisitions and inquiries, even if the preliminary inquiries had been so complete that it was only necessary to ask whether the former answers were still complete and accurate. Judgment for the plaintiff.

APPEARANCES: *C. P. Harvey*, Q.C., and *J. P. Brookes* (*Chandler & Creeke*); *Patrick O'Connor* (*Hewitt, Woollacott & Chown*).

[Reported by F. R. DYMOND, Esq., Barrister-at-Law] [1 W.L.R. 448

BANKRUPTCY: SET OFF: DEBT OWING TO DEBTOR BY BANKRUPT: DEBTOR'S OVERDRAFT GUARANTEED BY BANKRUPT: DISCHARGE OF OVERDRAFT BY TRUSTEE

***In re* a Debtor (No. 66 of 1955); *ex parte* the Debtor *v.* Trustee of Property of Waite (a Bankrupt)**

Harman and Danckwerts, JJ. 26th March, 1956

Appeal from Brighton County Court.

The Bankruptcy Act, 1914, provides, by s. 31: "Where there have been mutual credits, mutual debts or other mutual dealings, between a debtor against whom a receiving order shall

be made under this Act and any other person proving or claiming to prove a debt under the receiving order, an account shall be taken of what is due from the one party to the other in respect of such mutual dealings, and the sum due from the one party shall be set off against any sum due from the other party, and the balance of the account, and no more, shall be claimed or paid on either side respectively . . ." In January, 1952, the debtor agreed to sell goods to *W* on credit for which the debtor had to pay in cash. In order to pay for the goods the debtor found it necessary to borrow the requisite money from his bank, and *W*, in consideration of the credit which he thus received, agreed to guarantee the debtor's overdraft to an extent not exceeding £200, the guarantee being secured by a deposit of title deeds of certain property owned by *W*. During 1952 the debtor supplied goods to *W* to the value of £201 14s. 6d. and *W* paid £100 into the debtor's bank, which left a balance due of £101 14s. 6d. On 1st October, 1954, a receiving order was made against *W*, and *W's* trustee in bankruptcy, in the course of realising the assets and in order to complete a sale by him of the property secured by the deposit of title deeds, paid to the debtor's bank the sum of £133 14s., the amount of the debtor's overdraft, and obtained the release of the deeds. On 9th September, 1955, *W's* trustee commenced an action in the Brighton District Registry against the debtor to recover the sum of £133 14s. "paid for the defendant as his surety." The debtor appeared and claimed to set off the sum of £101 14s. 6d. for the goods supplied to *W* and interest on the overdraft, but on 6th October, 1955, the district registrar gave leave to *W's* trustee to sign judgment for the sum of £133 14s. and £16 16s. costs, a total of £150 10s. On 15th October, 1955, *W's* trustee in bankruptcy obtained the issue of a bankruptcy notice to the debtor in which was claimed payment of the sum of £150 10s. This bankruptcy notice was not complied with and on 22nd December, 1955, *W's* trustee filed a petition in bankruptcy against the debtor based on the said judgment debt. On 2nd February, 1956, the registrar (who was the same person as the registrar of the Brighton District Registry) was asked on behalf of the debtor to go behind his decision as district registrar in his judgment of 6th October, 1955, and allow the set off claimed by the debtor. On 6th February, 1956, the registrar, in a judgment, refused to go behind his previous judgment. On 9th February, 1956, a receiving order was made against the debtor. The debtor appealed.

DANCKWERTS, J., delivering the judgment of the court, said that the registrar's decision not to go behind his previous judgment was based on the view that the proper way to test it was by appeal. This was wrong, as even if the debtor had appealed and lost, it would still have been open to the bankruptcy court to go behind the judgment and re-open the matter: see *In re Fraser* [1892] 2 Q.B. 633. The first question was whether the debtor was able to rely on the set-off provisions of s. 31 in *W's* bankruptcy. At the date of the receiving order he had the right to prove for the debt due from *W*; it was much later that *W's* trustee paid off the debtor's overdraft. Thus, while there had been mutual dealings, there were at the date of the receiving order no mutual debts to be set off. The debtor had relied on *In re Daintrey* [1900] 1 Q.B. 546 and other cases, which were distinguishable. But in *Kitchen's Trustees* v. *Madders* [1950] Ch. 134 rent accrued due to a trustee after the date of the bankruptcy was not allowed to be set off. The debtor's claim was contrary to the observations in *In re Fenton* [1931] 1 Ch. 85, where it was said that until a surety was called on to pay and did pay under his guarantee there was no debt or right at law, but only a right to come into equity to get an indemnity against his liability. Accordingly, at the date of *W's* bankruptcy there was no debt due to *W* against which could be set off *W's* debt to the debtor for goods supplied. It followed that the decision in the action by the trustee against the debtor was right; there was no mutuality at the date of the receiving order, and the debt on which the action was founded was due not to *W* but to the trustee. It followed that the judgment was good and a proper foundation for a bankruptcy notice: see *In re a Bankruptcy Notice* (*No.* 171 *of* 1934) [1934] Ch. 431. The court was not bound to make a receiving order, as s. 5 (2) and (3) made the jurisdiction discretionary, but, taking all the circumstances into account, an order ought not to be refused in the present case. Appeal dismissed. Leave to appeal.

APPEARANCES: *Muir Hunter* (*Nye & Donne*, Brighton); *J. K. Wood* (*Haslewood, Hare, Shirley Woolmer & Co.*, for *Bosley & Co.*, Brighton).

[Reported by F. R. DYMOND, Esq., Barrister-at-Law] [1 W.L.R. 480

WILL: ELECTION: BEQUEST OF PROPERTY OF THIRD PARTIES: PART OWNER BENEFITING UNDER WILL

***In re* Dicey, deceased; Julian *v.* Dicey**

Danckwerts, J. 27th March, 1956

Adjourned summons.

A testatrix by cl. 4 of her will, made in 1950, devised to the plaintiff, her grandson, "my two freehold houses in Beresford Road, Walthamstow . . ." By cl. 5 she bequeathed to the defendant, her son, another freehold house, and also her real and personal residuary estate. The testatrix had no disposable interest in the two freehold houses in Beresford Road, which she merely occupied as a life tenant under a deed of family arrangement made in 1939, by which the defendant became on her death entitled to a half share of the beneficial interest in the houses, and the plaintiff and his brother to a quarter share each. The plaintiff claimed that the defendant must elect either in favour of the will and give effect to the devise to him (the plaintiff) so far as he could, or against the will, and compensate the plaintiff to the extent of his (the defendant's) interest under the will in respect of the plaintiff not receiving the defendant's share of the two houses. The defendant contended that the doctrine of election did not apply, on the ground, *inter alia*, that he himself could not give effect to the devise, since a quarter share belonged to the plaintiff's brother.

DANCKWERTS, J., said that the question of election could, at the most, only apply to the extent of a half share in the houses to which beneficially the defendant was entitled. The defendant contended that he was not put to any election at all. First, because there was no effective devise whatever of the two houses, apart from the fact that the testatrix did not own any devisable interest, as there was nothing to identify the houses. But when one knew the history of the matter, and found that the testatrix had occupied the houses, it was obvious that by the words "my two freehold houses in Beresford Road, Walthamstow," she meant those which she occupied as tenant for life. It had been argued that the defendant could not give effect to the bequest or devise in question, because he did not own the two freehold houses absolutely. It was an argument which had some force but it could not prevail in face of two cases he would mention. The first was *In re Booth* [1906] 2 Ch. 321, where the doctrine of election was very well stated by Swinfen Eady, J. (at p. 325), quoting Sir George Jessel in *Rogers* v. *Jones* (1876), 3 Ch. D. 688. The matter became even clearer on looking at *In re Ogilvie* [1918] 1 Ch. 492; the situation in that case and the observations of Younger, J., were quite inconsistent with the argument put forward by counsel, and he must therefore come to the conclusion that the question of election applied in the present case. To the extent of his half interest in the property of which the testatrix had attempted to dispose, the defendant was put to his election whether to give effect, in so far as he could, to the whole of the terms of the will of the testatrix. He might decide to elect in favour of the will (or approbate, as Scottish lawyers put it) and he would then have to give up the whole of his share in the properties in question. On the other hand, if he decided to reprobate, or elect against the will, he was under an obligation to compensate to a maximum which was limited on the one hand by the value of a half interest in the two properties in question and, on the other hand, by the total value of the interest which he took under the provision of the will of the testatrix. He had not yet elected, but it seemed to him that the defendant was bound within a reasonable time to decide one way or the other. Declaration accordingly.

APPEARANCES: *S. C. Silkin* (*Montlake & Co.*); *J. Hamawi Hames* (*Craigen, Wilders & Sorrell*).

[Reported by Mrs. IRENE G. R. MOSES, Barrister-at-Law] [2 W.L.R. 996

Queen's Bench Division

EVIDENCE: APPLICATION BY PLAINTIFF ON MEDICAL GROUNDS TO GIVE EVIDENCE BEFORE EXAMINER OUT OF COURT

Donn and Another *v.* Feinstein and Another

Slade, J. 5th March, 1956

Appeal to judge in chambers.

By their statement of claim the plaintiffs, Hyman Donn and his wife, Eve Donn, alleged that they had each been slandered by both of the defendants, Michael Feinstein and his wife, Marie

Feinstein. Both defendants denied by their defence that either of them had spoken or published the words alleged. Master Clayton granted the first-named plaintiff, on medical grounds, an order to be examined before an examiner of the court or a master or examiner to be agreed on. The defendants appealed against this order to Slade, J., in chambers, who approved the publication of the following note of the reasons for his decision supplied by counsel.

SLADE, J., said that he was fully alive to the practice of requiring strong evidence in support of an application by a party to an action to have his evidence taken otherwise than before the court, and to the even greater importance of following that practice when the action was to be before a jury, more especially so when the party applying was the plaintiff and not the defendant, because it was the plaintiff who had chosen the venue, and, when the action was one for defamation, it was of paramount importance that the jury should see the plaintiff. Although granting or refusing leave was a question of discretion, the discretion should be exercised on the principle of refusing to allow the plaintiff's evidence to be given elsewhere than before the court, unless "'there are very strong positive reasons' for his not attending to be examined at the trial" (see Gatley on Libel and Slander, 4th ed., p. 545, citing Cotton, L.J., in *Lawson* v. *Vacuum Brake Co.* (1884), 27 Ch. D. 137). He was prepared to assume that, where the reasons were based on the plaintiff's ill-health, an order for examination before an examiner would not be made unless it was shown that the plaintiff could only attend the court with some risk to his life. There was evidence, which was not in dispute, that the first-named plaintiff suffered serious organic heart disease, and there was also evidence, which was not common ground although quite strong evidence, that the excitement of attending the trial and undergoing cross-examination might well involve considerable risk to his life. It seemed that no serious injury could accrue to the defendants by making the order which he proposed to make, subject to the conditions as to the use of the depositions at the trial, whereas very grave injury might accrue to the first-named plaintiff if he refused to make the order *de bene esse* and, when the trial was reached, it was no longer in dispute between the parties that the first-named plaintiff's attendance would involve risk to his life. Therefore, he exercised his discretion and varied the master's order by providing that the deposition of the first-named plaintiff to be taken thereunder should not be used at the trial of the action without the consent of the trial judge, who should be furnished with the evidence of the first-named plaintiff's then state of health, he undertaking to submit himself for examination at his house by a doctor selected by the defendants, in the presence, if so desired, of his own doctor. Order varied.

APPEARANCES: *G. Cohen* (*John Holt*); *Lord Dunboyne* (*F. H. Lawton* with him) (*Max Bitel & Co.*).

[Reported by F. R. DYMOND, Esq., Barrister-at-Law] [1 W.L.R. 478

AGRICULTURAL HOLDING: NOTICE TO QUIT GIVING REASONS: WHETHER VALID

Hammon *v.* Fairbrother and Others

Cassels, J. 26th March, 1956

Action.

By s. 24 (1) of the Agricultural Holdings Act, 1948, if notice to quit is given the tenant may serve a counter-notice, whereupon the notice to quit shall not have effect unless the Minister consents. This, by subs. (2), does not apply where "(*d*) at the date of the giving of the notice to quit the tenant had failed to comply with a notice . . . requiring him within two months . . . to pay any rent due . . . or within a reasonable time . . . to remedy any breach . . . of any term or condition of his tenancy . . . and it is stated in the notice to quit that it is given by reason of the matter aforesaid." The tenant of an agricultural holding was served with a notice to quit in which the landlords stated as their reasons (1) that a year's rent was unpaid; (2) that the property and appurtenances had not been kept in good tenantable repair, and (3) that the tenant had not complied with the agreement to repay to the landlords certain moneys expended in repairs to the property. The tenant served a counter-notice, but the Minister gave his consent to the notice to quit. The tenant then issued a writ for a declaration that the notice to quit was invalid as it was not a clear and unambiguous notice under s. 24 (1), and that in stating reasons it fell within subs. (2) but failed to comply with it. The landlords counter-claimed for possession and mesne profits.

CASSELS, J., said that in *Budge* v. *Hicks* [1951] 2 K.B. 335 Denning, L.J., had said that a notice which did not make it clear under which subsection it came was bad, and in *Cowan* v. *Wrayford* [1953] 1 W.L.R. 1340 he had said that a notice must be either a simple notice under subs. (1) "without stating reasons at all" or a notice stating reasons as prescribed by subs. (2). But the words "without stating reasons at all" seemed unnecessary for the decision, and it would be hard to hold that, where a landlord gave reasons, which might be various and personal and wholly outside the scope of subs. (2), the notice fell under that subsection. In the present case the notice did not comply with subs. (2) (*d*) as there had been no two months' notice regarding the rent. The landlords' solicitors had informed the tenant's solicitors that they gave the reasons out of courtesy. The notice was not ambiguous, and fell within subs. (1), and the landlords were entitled to judgment for possession and mesne profits. Judgment for the defendants.

APPEARANCES: *G. Dobry* (*Field, Roscoe & Co.*, for *Hallett & Co.*, Ashford, Kent); *C. F. Fletcher-Cooke* (*Hirst & Co.*).

[Reported by F. R. DYMOND, Esq., Barrister-at-Law] [1 W.L.R. 490

LEGAL AID: COSTS: VARIATION OF ORDER AGAINST ASSISTED PERSON

Corrick *v.* Northam

Byrne, J. 10th April, 1956

Motion to vary an order for costs under reg. 17 of the Legal Aid (General) Regulations, 1950, as amended.

BYRNE, J., said that the motion was on behalf of the defendant, in whose favour a nominal order for costs was made against the plaintiff as an assisted person at Exeter Assizes on 10th November, 1954, to vary the plaintiff's liability for costs under reg. 17 (4) of the Legal Aid (General) Regulations, 1950, as amended. The motion was in accordance with the following procedure approved by Lord Goddard, C.J., on 14th March, 1956: "Where a party in whose favour an order for costs has been made against an assisted person after trial by a judge of the Queen's Bench Division in London or on circuit desires to apply 'to the court' under reg. 17 (4) of the Legal Aid (General) Regulations, 1950, as amended, for variation of the order, the application should be made by notice of motion (R.S.C., Ord. 52) before the judge who made the order, if convenient, or to the judge in charge of the appropriate list. The notice of motion, entitled in the action, may be framed from Form No. 1 on p. 967 of Chitty's Queen's Bench Forms, 18th ed. The applicant's solicitor should, through the Crown Office and Associates' Department in London, consult the judge's clerk and ascertain a convenient date and time for the hearing. The notice of motion should be served personally on the assisted person with at least two clear days between the service of the notice of motion and the date of hearing in accordance with R.S.C., Ord. 52, r. 5. The hearing will be before the judge in open court, when the provisions of reg. 17, in determining the amount of the assisted person's liability for costs in accordance with s. 2 (2) (*e*) of the Legal Aid and Advice Act, 1949, will apply. Any order made for an increase of the amount of liability shall include a direction that the judgment shall be indorsed accordingly." He (his lordship), was satisfied in the present case that there had been a change in circumstances. It was agreed between the parties at the time of the action that the plaintiff's weekly wage was £4 14s. 6d., and it now transpired that she was receiving at least £6 a week, was of full age and a married woman. There would be an order that the plaintiff paid £75 costs by instalments of £8 a month, the first instalment to be payable on 1st May, and she should have liberty to apply to his lordship in chambers to vary the amount of the instalments if it became necessary. The judgment containing the original determination should be indorsed accordingly. Order accordingly.

APPEARANCES: *Christopher Besley* (*Martineau & Reid*, for *Campion, Symons & Co.*, Exeter); *J. H. Inskip* (*Pettit and Westlake*, for *Penny & Harward*, Exeter).

[Reported by J. D. PENNINGTON, Esq., Barrister-at-Law] [1 W.L.R. 485

Probate, Divorce and Admiralty Division

HUSBAND AND WIFE: ADULTERY: MISCONDUCT CONDUCING: LOSS OF AFFECTION DUE TO IMPROPER ASSOCIATION

Brown *v.* Brown

Lord Merriman, P., and Collingwood, J. 16th March, 1956

Appeal by a wife from the Great Yarmouth justices.

The parties were married on 19th September, 1953. In the spring of 1955 the wife began an association with one Morley,

and she admitted in evidence that she had gone out with him from time to time. The husband stated that he had noticed a change in his wife's attitude towards him, and that she neglected him. As regards sexual intercourse, he said that she became cold; that it was not "love"; and that she said that she regarded it as a form of duty on her part. He had attributed this to fear of childbirth; and said that he did not then know of any other man in her life. On 5th September, 1955, the husband admitted that he had committed adultery on 31st August, 1955, and on 2nd September, 1955. The wife thereupon disclosed to him, for the first time, her association with Morley—of whose existence the husband had hitherto been unaware. Subsequently Morley came to the house, and the wife then expressed her love for Morley (in her evidence qualified as "perhaps infatuation"). She denied adultery, and the husband nowhere suggested that he had suspected adultery. With regard to his own adultery he said in evidence: "I can only say it [the cause of my adultery] was lack of affection on my wife's part. There were signs of my marriage coming to an end before I went with [the other woman]." At the conclusion of the hearing the justices held that the wife's conduct had conduced to the husband's adultery but that, in the alternative, even if that were not proved, they were very far from satisfied that the wife had not by her wilful neglect or misconduct conduced to the adultery and that they were debarred by s. 11 (3) of the Matrimonial Causes Act, 1937 from making an order. The crucial sentence of their reasons was as follows: "We have no doubt that this evident loss of the wife's affection and interest conduced to the husband's adultery, and we are satisfied that it" [i.e., the evident loss of the wife's affection and interest] "was due to the association of the wife with another man, which, whether or not adulterous, was improper, and so (notwithstanding the husband's ignorance of it) constituted misconduct." *Cur. adv. vult.*

LORD MERRIMAN, P., reading the judgment of the court, referred to s. 11 of the Matrimonial Causes Act, 1937 (which had not been repealed by the 1950 Act), and observed that by subs. (3) misconduct conducing was an absolute bar to an order and that the onus of satisfying the court that his or her misconduct had not conduced to the adultery charged was placed on the complainant, as in the case of the absolute bars to relief upon a petition for divorce. His lordship referred, however, to the reference in *Churchman* v. *Churchman* [1945] P. 44, 52, to *Robins* v. *National Trust Co.* [1927] A.C. 515, 520, and also to *Watt or Thomas* v. *Thomas* [1947] A.C. 484, 487, in support of the proposition that no question of burden of proof arose unless the court was unable to come to a conclusion upon the evidence. But whether the matter fell to be decided on the positive finding, or upon the onus of proof, the essential question remained: Was the wife's conduct capable, in law, of amounting to misconduct conducing to the husband's adultery? The court unreservedly accepted the finding of the justices about the impropriety of the association, but rejected the argument that if loss of affection and interest was held to be misconduct conducing to adultery, no spouse would be safe from the stigma of misconduct conducing when the ardour of early married life abated in the course of time. It was, however, not surprising that the justices did not accept the wife's evidence that "guilty conscience" about her association did not affect her attitude towards her husband, not least in their sexual relations; and it was perfectly natural that her husband should sense that something was wrong. The court held that there was no break in the chain of causation between the association and its impact on the husband's mind and feelings. But that still left open the question whether the association, or its impact on the husband, was capable in law of amounting to misconduct conducing to his adultery. It was not easy to reconcile all the cases on misconduct conducing. There was a conflict of authority as to whether (unjustified) refusal of marital intercourse amounted to misconduct conducing; yet in *Richards* v. *Richards* [1952] P. 307 it was held that where there was ordinary (but not constructive) desertion and nothing more, adultery on the part of the wife "is not due to the desertion, but is due to her own weakness of character, or, as no doubt she would prefer to put it, because she fell in love with another man." Yet desertion in the nature of things almost invariably involved total deprivation of sexual intercourse, although it was well settled that the refusal of sexual intercourse did not by itself constitute desertion (*Weatherley* v. *Weatherley* [1947] A.C. 628). Thus, desertion was clearly a graver matrimonial offence than refusal of sexual intercourse: if the greater included the less, it was not altogether clear, on principle, how it was that refusal of sexual intercourse could, but desertion could not, amount to misconduct conducing. There appeared to be singularly little authority on the question whether even actual adultery by the petitioner could, *per se*, be misconduct conducing to the adultery of the other spouse; but in the present case, however, the husband did not assert that he believed that the wife had committed adultery; and there was a very long step between a belief in adultery and a suspicion of an improper association. Although the Court of Appeal had held in *Cox* v. *Cox* (1893), 70 L.T. 200 (a case on pleadings) that conduct short of adultery might conduce to adultery, there had been a course in that case, of undue familiarity, persisted in by the husband, and even flaunted by him in the face of the wife, despite her repeated remonstrances, over many years. In the present case, although the association itself had been improper, the most that could be said about its impact on the husband was that he might have sensed that there was something wrong. The conduct and the impact was so different in degree from that pleaded in *Cox* v. *Cox*, *supra*, that it would be going much further than was warranted by that case, or by any other decision, if the court was to hold that the facts in the present case were capable of amounting to misconduct conducing. No doubt the wife's evident loss of affection and interest might have rendered the husband more susceptible to temptation, but the misconduct found against the wife could not in law be held to be misconduct conducing to the husband's adultery. Appeal allowed. Leave to appeal.

APPEARANCES: *K. Bruce Campbell* (*Gardiner & Co.*, for *Humphrey Lynde & Vine*, Great Yarmouth); *J. D. F. Moylan* (*Field, Roscoe & Co.*, for *Richards & Flewitt*, Nottingham).

[Reported by JOHN B. GARDNER, Esq., Barrister-at-Law] **[2 W.L.R. 1000**

Central Criminal Court

CRIMINAL LAW: ACT COMMITTED IN BRITISH AIRCRAFT ABROAD: OFFENCE IF COMMITTED IN UNITED KINGDOM

R. *v.* Martin and Others

Devlin, J. 22nd March, 1956

Trial on indictment.

The defendants were charged with being in possession of raw opium on British aircraft flying between Bahrein and Singapore, contrary to reg. 3 of the Dangerous Drugs Regulations, 1953. On a motion to quash the indictment on the ground that the English courts had no jurisdiction to try the offences alleged, the prosecution conceded that reg. 3 only created an offence if the act was done in England, but alleged that under s. 62 of the Civil Aviation Act, 1949, any act which if done in England would be an offence was an offence if committed on a British aircraft. Regulation 3 provides: "A person shall not be in possession of a drug unless he is generally so authorised . . ." Section 62 provides: "(1) Any offence whatever committed on a British aircraft shall, for the purpose of conferring jurisdiction, be deemed to have been committed in any place where the offender may for the time being be."

DEVLIN, J., said that, according to the prosecution, the section meant that if an offence was committed on a British aircraft, and the aircraft landed at London airport and the prisoner was arrested there, the offence could be deemed to have been committed in London. The defence contended that the section dealt only with venue, and that, if the prosecution were right, the section must be construed as itself creating the offence. According to the contentions of the parties, if the prosecution were wrong, there was no law on board a British aircraft; if the defence were wrong, anybody of any nationality on board a British aircraft anywhere was subject to the whole of the British criminal law. In general, a foreigner was not liable under English law for an offence committed on land abroad, though there were certain statutory exceptions. It appeared that s. 62 was the only section which made a criminal act done in the air an offence, apart from the statutory exceptions of treachery and bigamy, a crime not likely to be committed in flight. Accordingly, the prosecution contended that it must be given a wide enough construction to make it an offence-creating section, the word "offence" being construed as "any act which if done in England would be an offence." There were great inconveniences either

way, and the only safe course was to apply a strict construction to the section, and in so doing the additional words required by the prosecution must be rejected. That was not to say that the section was wholly ineffective; the concession of the Crown that the offence charged was only an offence if committed in the United Kingdom might not apply to acts which were offences everywhere, such as murder and theft, and the section gave jurisdiction to the courts over an act which was an offence wherever done. The present decision must be regarded as applying only to the particular offence charged. The indictment would be quashed on the ground that the regulation creating the offence did not apply to acts done in British aircraft out of England. Indictment quashed.

APPEARANCES: *Christmas Humphreys* and *E. J. P. Cussen* (*Director of Public Prosecutions*); *J. Foster*, Q.C., and *A. Campbell* (*Theodore Goddard & Co.*); *S. C. Silkin* (*Lewis Silkin & Partners*); *A. M. Stevenson*, Q.C., *A. Orr* and *W. A. B. Forbes* (*J. H. Milner and Son*).

[Reported by F. R. DYMOND, Esq., Barrister-at-Law] [2 W.L.R. 975

CORRECTION

In our report of *Smith* v. *East Elloe Rural District Council and Others*, *ante*, p. 282, the name of Mr. J. A. Crawley, as counsel for the appellant, was included in error.

IN WESTMINSTER AND WHITEHALL

HOUSE OF LORDS

PROGRESS OF BILLS

Read First Time:—

Agricultural Mortgage Corporation Bill [H.C.] [12th April.
Bournemouth–Swanage Motor Road and Ferry Bill [H.C.] [19th April.
Small Lotteries and Gaming Bill [H.C.] [17th April.
Transport (Disposal of Road Haulage Property) Bill [H.C.] [17th April.
Walsall Corporation Bill [H.C.] [17th April.
West Bromwich Corporation Bill [H.C.] [17th April.

Read Second Time:—

Pensions (Increase) Bill [H.C.] [19th April.

Read Third Time:—

Barry Corporation (Barry Harbour) Bill [H.C.] [18th April.
Castle Gate Congregational Church Burial Ground (Nottingham) Bill [H.C.] [17th April.
Department of Scientific and Industrial Research Bill [H.L.] [19th April.
Ipswich Dock Bill [H.C.] [17th April.
Rabbits Bill [H.L.] [19th April.

In Committee:—

Justices of the Peace Act, 1361 (Amendment) Bill [H.C.] [17th April.

HOUSE OF COMMONS

PROGRESS OF BILLS

Read Second Time:—

North-East Surrey Crematorium Board Bill [H.L.] [16th April.
Pontypool and District Water Bill [H.L.] [16th April.

Read Third Time:—

Saint Stephen Walbrook (Saint Antholin's Churchyard) Bill [H.L.] [18th April.

STATUTORY INSTRUMENTS

Additional Import Duties (No. 1) Order, 1956. (S.I. 1956 No. 537.)

Aerated Waters Wages Council (England and Wales) Wages Regulation (Amendment) Order, 1956. (S.I. 1956 No. 562.) 5d.

Draft **Calf Subsidies** (Scotland) Scheme, 1956.

Canals (Additional Charges) (Amendment) Regulations, 1956. (S.I. 1956 No. 550.)

County of West Lothian (Linhouse Water) Water Order, 1956. (S.I. 1956 No. 541 (S. 26).) 5d.

Draft **Double Taxation Relief** (Estate Duty) (India) Order, 1956. 6d.

Field Punishment (Air Force) Rules, 1956. (S.I. 1956 No. 560.)

Field Punishment (Army) Rules, 1956. (S.I. 1956 No. 561.)

Harbours, Docks and Piers (Additional Charges) (Amendment) Regulations, 1956. (S.I. 1956 No. 548.)

Import Duties (Exemptions) (No. 3) Order, 1956. (S.I. 1956 No. 536.)

Import Duties (Exemptions) (No. 4) Order, 1956. (S.I. 1956 No. 563.)

Motor Vehicles (Construction and Use) (Amendment) Regulations, 1956. (S.I. 1956 No. 540.)

Railways (Additional Charges) (Amendment) Regulations, 1956. (S.I. 1956 No. 549.) 5d.

Rules of the Supreme Court (No. 1) 1956. (S.I. 1956 No. 551 (L. 7).)

These rules come into operation on 1st May next. They prescribe the time within which appeals to the High Court from Panel (Complaints) Tribunals under the Legal Aid and Advice Act, 1949, must be brought as 21 days from notification of the tribunal's decision. They also abolish the fee payable on appearance by post, following the general appearance fee's abolition (p. 268, *ante*). The following obsolete provisions of the R.S.C. are revoked: Ord. 8, r. 3; Ord. 9, r. 14A; Ord. 16, r. 13A; Ord. 17, r. 7A; Ord. 31, r. 19; Ord. 34, r. 8; part of Ord. 35, r. 9; Ord. 36, r. 55c proviso; Ord. 37, r. 34B; Ord. 42, rr. 24A, 24B; part of Ord. 50, r. 5; part of Ord. 53B, r. 3; part of Ord. 54, r. 12 (*d*); Ord. 54D, r. 5; Ord. 55, rr. 4A, 14A (4) (*a*) and (*d*); Ord. 55B, rr. 39–48; Ord. 60, r. 1; and Ord. 63, r. 13.

Rules of the Supreme Court (Non-Contentious Probate Costs) 1956. (S.I. 1956 No. 552 (L. 8).)

See p. 288, *ante*, as to these rules.

Safeguarding of Industries (Exemption) (No. 4) Order, 1956. (S.I. 1956 No. 564.)

Stopping up of Highways (Bedfordshire) (No. 5) Order, 1956. (S.I. 1956 No. 533.)

Stopping up of Highways (Leicestershire) (No. 8) Order, 1956. (S.I. 1956 No. 546.)

Stopping up of Highways (Lincolnshire—Parts of Lindsey) (No. 2) Order, 1956. (S.I. 1956 No. 553.)

Stopping up of Highways (London) (No. 13) Order, 1956. (S.I. 1956 No. 534.)

Stopping up of Highways (London) (No. 15) Order, 1956. (S.I. 1956 No. 547.)

Stopping up of Highways (Sheffield) (No. 1) Order, 1956. (S.I. 1956 No. 539.)

Wigan Water Order, 1956. (S.I. 1956 No. 556.) 5d.

Zetland County Council (Brow and Huesbreck Lochs, Sunburgh) Water Order, 1956. (S.I. 1956 No. 542 (S. 27).) 5d.

[Any of the above may be obtained from the Government Sales Department, The Solicitors' Law Stationery Society, Ltd., 21 Red Lion Street, London, W.C.1. The price in each case, unless otherwise stated, is 4d., post free.]

BOOKS RECEIVED

The Public Control of Land. By J. F. GARNER, LL.M., Solicitor of the Supreme Court. pp. xxiii and (with Index) 204. 1956. London: Sweet & Maxwell, Ltd. £1 15s. net.

The County Court Practice, 1956. By HIS HONOUR JUDGE EDGAR DALE, R. C. L. GREGORY, LL.B., of Gray's Inn, Barrister-at-Law, and MR. REGISTRAR DOUGLAS FEARN, Registrar of the Lambeth and Southwark County Courts. pp. cclvii and (with Index) 2100. 1956. London: Butterworth & Co. (Publishers), Ltd.; Sweet & Maxwell, Ltd.; Stevens & Sons, Ltd. £3 17s. 6d. net.

"Current Law" Income Tax Acts Service. [CLITAS]. Releases 31 and 32. 1956. London: Sweet & Maxwell, Ltd.; Stevens & Sons, Ltd. Edinburgh: W. Green & Son, Ltd.

The Stock Exchange Official Year Book 1956. Volume I. Editor-in-Chief: Sir HEWITT SKINNER, Bt. pp. cxli and 1602. 1956. London: Thomas Skinner & Co. (Publishers), Ltd. £8 net (two volumes).

Oyez Practice Notes: No. 24. Robinson's County Court Costs. Second Edition. By D. FREEMAN COUTTS, Registrar, West London and Wandsworth County Courts. pp. 60. 1956. London: The Solicitors' Law Stationery Society, Ltd. 8s. net.

The Food and Drugs Act, 1955. Reprinted from Butterworths Annotated Legislation Service. With an Introduction by JOHN A. O'KEEFE, LL.B., B.Sc.(Econ.), of the Middle Temple, Barrister-at-Law, and Annotations to Sections by ROBERT SCHLESS, of Gray's Inn, Barrister-at-Law. pp. x and (with Index) 216. 1956. London: Butterworth & Co. (Publishers), Ltd. £1 10s. net.

Phillips' Probate and Estate Duty Practice. Fifth Edition. By D. C. SEALY-JONES, LL.M., Solicitor (Honours). pp. xlviii and (with Index) 654. 1956. London: The Solicitors' Law Stationery Society, Ltd. £2 15s. net.

The Law of Contract. Fourth Edition. By G. C. CHESHIRE, D.C.L., F.B.A., of Lincoln's Inn, Barrister-at-Law, and C. H. S. FIFOOT, M.A., F.B.A., of the Middle Temple, Barrister-at-Law. pp. lxvii and (with Index) 592. 1956. London: Butterworth & Co. (Publishers), Ltd. £2 7s. 6d. net.

Ranking, Spicer and Pegler's Executorship Law and Accounts. Nineteenth Edition. By H. A. R. J. WILSON, F.C.A., F.S.A.A. pp. xxxix and (with Index) 377. 1956. London: H. F. L. (Publishers), Ltd. £1 15s. net.

NOTES AND NEWS

Honours and Appointments

His Honour Judge MYLES ARCHIBALD has been appointed Chairman of the Court of Quarter Sessions for the East Riding of the County of York.

Mr. VERNON RODNEY MONTAGU GATTIE, C.B.E., has been appointed Deputy Chairman of the Court of Quarter Sessions for the County of Surrey.

Mr. J. F. CLAXTON, senior legal assistant in the office of the Director of Public Prosecutions, has been appointed an assistant director in succession to Mr. H. J. Parham, who is retiring.

Mr. E. COOKE LEE, deputy town clerk of Blackpool since 1937, has been appointed town clerk.

Personal Notes

Mr. Bruce John Elliott, solicitor, of Bournemouth, was married recently to Miss Joy Redpath, of Boscombe East.

Miscellaneous

DEVELOPMENT PLANS

(Other development plans: see p. 310, ante.)

CITY OF YORK DEVELOPMENT PLAN

On 19th March, 1956, the Minister of Housing and Local Government approved with modifications the above development plan. A certified copy of the plan as approved by the Minister has been deposited at the office of the City Engineer and Planning Officer at 6 and 7 St. Leonard's Place, York. The copy of the plan so deposited will be open for inspection free of charge by all persons interested between 9 a.m. and 12 noon and between 2 p.m. and 5 p.m. from Monday to Friday and from 9.30 a.m. to 11 a.m. on Saturday. The plan became operative as from 17th April, 1956, but if any person aggrieved by the plan desires to question the validity thereof or of any provision contained therein on the ground that it is not within the powers of the Town and Country Planning Acts, 1947–54, or on the ground that any requirement of the Act or any regulation made thereunder has not been complied with in relation to the approval of the plan, he may, within six weeks from 17th April, 1956, make application to the High Court.

NATIONAL PARKS AND ACCESS TO THE COUNTRYSIDE ACT, 1949

The following notices of the preparation of maps and statements under the above Act, or of modifications to maps and statements already prepared, have appeared since the table given at p. 115, *ante*:—

DRAFT MAPS AND STATEMENTS

Surveying Authority	Districts covered	Date of notice	Last date for receipt of representations or objections
Berkshire County Council	Newbury Borough; Hungerford, Newbury, Bradfield Rural Districts: modifications to draft map and statement of 1st September, 1954	9th February, 1956	9th March, 1956
Cardiganshire County Council	Cardigan Borough; Teifiside Rural District	27th February, 1956	7th July, 1956
	Tregaron Rural District: modifications to draft map and statement of 14th July, 1954	26th March, 1956	29th April, 1956
Cheshire County Council	Crewe Municipal Borough; Nantwich Urban and Rural Districts	6th February, 1956	15th June, 1956
Cornwall County Council	Liskeard Rural District	23rd March, 1956	31st July, 1956
East Sussex County Council	Hailsham, Uckfield Rural Districts: further modifications and modifications, respectively, to draft maps and statements of 25th March, 1955, and 4th December, 1955	3rd February, 1956	2nd March, 1956
Hertfordshire County Council	Bishop's Stortford, Sawbridgeworth Urban Districts: Braughing Rural District: modifications to draft map and statement of 22nd May, 1953	3rd February, 1956	4th March, 1956
Lincoln County Council, Parts of Lindsey	Skegness Urban District; Spilsby Rural District	24th February, 1956	29th June, 1956
Norfolk County Council	Smallburgh Rural District	7th March, 1956	30th July, 1956
Pembrokeshire County Council	Narberth Urban and Rural Districts	22nd March, 1956	30th September, 1956
Radnorshire County Council	Radnor County: modifications to draft map and statement of 12th December, 1953	17th March, 1956	29th April, 1956
Somerset County Council	Bridgwater Borough and Rural District	8th February, 1956	14th August, 1956

PROVISIONAL MAPS AND STATEMENTS

Surveying Authority	Districts covered	Date of notice	Last date for applications to Quarter Sessions
Salop County Council	Bridgnorth and Ludlow Boroughs and Rural Districts (all parishes); All Stretton and Cardington Parishes in Atcham Rural District	6th April, 1956	3rd May, 1956
West Suffolk County Council	West Suffolk Administrative County except Sudbury Borough	29th March, 1956	25th April, 1956

DEFINITIVE MAPS AND STATEMENTS

Surveying Authority	Districts covered	Date of notice	Last date for applications to the High Court
East Sussex County Council	East Grinstead Urban District	9th March, 1956	19th April, 1956
Northampton County Council	Desborough Urban District	7th February, 1956	19th March, 1956
	Higham Ferrers Borough	7th February, 1956	19th March, 1956
	Rothwell Urban District	7th February, 1956	19th March, 1956
	Rushden Urban District	7th February, 1956	19th March, 1956
	Wellingborough Rural District	13th March, 1956	23rd April, 1956
	Wellingborough Urban District	7th February, 1956	19th March, 1956

DIVORCE REGISTRY

COSTS: TAXATION: POLISH TRANSLATIONS

The Senior Registrar, after consultation with the Masters of the Supreme Court Taxing Office, is of opinion that under present conditions it is more appropriate to treat Polish upon the same basis as French, German, Spanish, etc., than as an "other language" (Annual Practice, 1956, p. 1483) for the purpose of fixing the rate allowed on taxation for translations.

He is also of opinion that the employment of a translator as an intermediary between a Polish assisted party and his own solicitor requires to be strictly justified, and should in any event be kept to a minimum. In particular, the translation of simple letters (such as "Writing Petitioner to call") from a solicitor to a Polish client resident in England should seldom be necessary.

D. A. NEWTON,
Secretary.

19th April, 1956.

COUNTY COURTS

The Lord Chancellor has transferred His Honour Judge Rowe Harding to Circuit 30 (Glamorgan) in succession to the late Judge Gerwyn Thomas and has replaced him on Circuit 28 (Shropshire and part of Wales) by the appointment of Mr. David Eifion Evans, Q.C., as a county court judge.

Wills and Bequests

Mr. Bernard Richard Masser, solicitor, of Coventry, left £20,619 (£20,179 net).

Mr. Richard Edgar Sharples, solicitor, of Kirk Michael, Isle of Man, formerly of Accrington, left £4,338 (£4,301 net).

OBITUARY

MR. C. D. ALLEN

Mr. Charles Dudley Allen, solicitor, of Newcastle-under-Lyme, died on 6th April, aged 55. He was vice-president of the North Staffordshire and District Law Society, and a member of the Market Drayton Urban District Council for the past seventeen years. He was admitted in 1926.

MR. W. B. FORWARD

Mr. William Bryan Forward, town clerk of Beccles from 1914 until his resignation in 1947, died on 16th April, aged 83. He was admitted in 1901.

MR. A. E. PENNY

Mr. Albert Edward Penny, retired solicitor, formerly of Willesden, London, N.W.10, died at Wembley, Middlesex, on 14th April, aged 75. He was admitted in 1903.

MR. F. W. TREHEARNE

Mr. Frank William Trehearne, a Master of the Supreme Court (Chancery Division) from 1938–54, died on 16th April, aged 74. He was admitted in 1904.

MR. E. F. TRUMP

Mr. Edmund Francis Trump, solicitor, of Bristol, has died, aged 77. He was admitted in 1904.

SOCIETIES

The President of The Law Society, Mr. W. CHARLES NORTON, gave a luncheon party on 17th April at 60 Carey Street, Lincoln's Inn. The guests were: The High Commissioner for the Federation of Rhodesia and Nyasaland, Colonel Lord Astor of Hever, Lord Justice Romer, Sir Oliver Franks, Sir Robert Speed, Mr. Bertram Long, Mr. E. T. Maddox, Mr. J. Eliott and Mr. T. G. Lund.

The annual dinner and ball of the PLYMOUTH LAW STUDENTS SOCIETY was held on 13th April, at the Duke of Cornwall Hotel. Mr. K. C. BRIAN, president of the Plymouth Incorporated Law Society, was present.

The SOLICITORS' ARTICLED CLERKS' SOCIETY announce the following programme:—

Thursday, 3rd May: Scottish Reels at The Law Society's Hall, 6 p.m. Members 1s., Visitors 1s. 6d. Refreshments available.

Tuesday, 8th May: Guest Debate at The Law Society's Hall, from 6 p.m. The motion will be: "The day of the politician and the diplomat has gone." Guest speakers will be: Proposing: Mr. B. A. Young, of *Punch*. Opposing: Mr. Benn Levy.

Tuesday, 15th May: Squash Tournament. This will be played at the Chelsea Cloisters, Sloane Avenue, Chelsea, from 6.30 p.m. Entrance fee is 2s. and a prize will be awarded. Applications to Patrick Wright, c/o The Society's address, or telephone STA 1295.

Thursday, 24th May: Social Evening at The Law Society's Hall from 6 p.m. Refreshments available. A general knowledge bee will be conducted.

Wednesday, 30th May: Cricket. The Society is playing a Law School team. For further details, contact Irving Benjamin (HOL 1311 or TUL 4937 evenings).

PRINCIPAL ARTICLES APPEARING IN VOL. 100

7th to 28th April, 1956

For list of articles published up to and including 31st March, see *ante*, p. 248.

"THE SOLICITORS' JOURNAL"

Editorial, Publishing and Advertising Offices: 21 Red Lion Street, London, W.C.1. Telephone: CHAncery 6855.

Annual Subscription: Inland £3 15s., Overseas £4 5s. (payable yearly, half-yearly or quarterly in advance).

Advertisements must be received first post Wednesday.

Contributions are cordially invited and should be accompanied by the name and address of the author (not necessarily for publication).